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Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~95~~ 43

LESTER J. ALBRECHT, PETITIONER,

vs.

THE HERALD COMPANY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 14, 1967
CERTIORARI GRANTED FEBRUARY 27, 1967

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT.**

**No. 18,161.
CIVIL**

**LESTER J. ALBRECHT,
APPELLANT,**

vs.

**THE HERALD COMPANY, A CORPORATION, D/B/A
GLOBE-DEMOCRAT PUBLISHING COMPANY,
APPELLEE.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.**

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In the United States District Court,
Eastern District of Missouri,
Eastern Division.

Lester J. Albrecht,

Plaintiff,

vs.

The Herald Company, a Corporation,
d/b/a Globe-Democrat Publishing
Company,

Defendant.

Case
No. 64 C 302(2).
Meredith, J.

Complaint.

(Filed in U. S. District Court August 12, 1964.)

Count I.

Comes now plaintiff and for his complaint under Count I states that:

1. Plaintiff is a resident of the State of Missouri, and is an individual engaged in the business of owning and operating a newspaper carrier route known as St. Louis Globe-Democrat Route No. 99 in the County of St. Louis, Missouri, since June 1, 1956.

2. The Globe-Democrat Publishing Company, a Missouri corporation, was liquidated on December 29, 1963, and its assets and liabilities were transferred to and assumed by defendant The Herald Company, a corporation, incorporated and existing under the laws of the State of New York and having its principal place of business in the State of New York, which latter corporation is doing

business as Globe-Democrat Publishing Company in the City of St. Louis, Missouri, and elsewhere, said business consisting of the publishing and selling of a daily newspaper known as the "St. Louis Globe-Democrat", in said City and State as well as outside of said State. Defendant is engaged in commerce as defined in Section 12 of Title 15, U. S. C. A., and is engaged in activities affecting commerce.

3. This Court has jurisdiction over this cause of action and the parties under Title 15, U. S. C. A.; and also under Title 28, Section 1332, because plaintiff and defendant are citizens of different states and the matter in controversy exceeds the sum of \$10,000.00.

4. Defendant and the Globe-Democrat Publishing Company (hereinafter sometimes referred to collectively as "the Publisher") for a long period of time prior to June 1, 1956, and up to the present time caused the said St. Louis Globe-Democrat newspaper to be delivered to its subscribers in the greater metropolitan St. Louis area by means of a system of carriers, and for the purpose of distributing and delivering its said newspaper, without cost to itself, to its subscribers, the Publisher divided the Greater Metropolitan St. Louis area into certain districts, commonly called routes, and has sold, given or approved and authorized the sale to various paper carriers, including plaintiff, of such routes, lists of subscribers within said routes, certain rights and privileges and the good will of the business of such newspaper carrier routes.

5. Plaintiff, as well as the other newspaper carriers for the Publisher, acquired his said route with the knowledge, consent and approval of the Publisher, and it was known, understood and agreed by and between plaintiff and the Publisher that, for the consideration paid and the promises and undertakings made by plaintiff, that in accordance with long, well-established custom, practice and

usage as between the Publisher and its carriers, that plaintiff was an independent contractor, that plaintiff would have the exclusive right to sell and deliver the St. Louis Globe-Democrat to the subscribers of said paper within his said route, and that the Publisher would not impair or destroy plaintiff's investment in his said route.

6. Plaintiff, as the owner and operator of said route, has since June 1, 1956, purchased St. Louis Globe-Democrat newspapers from the Publisher at wholesale, without the right to return any newspapers so purchased, and sold said newspapers at retail to numerous customers within said route with whom plaintiff has entered into separate agreements to deliver to them the St. Louis Globe-Democrat; and from the time he purchased said route has faithfully performed all of his duties as a carrier of defendant's newspaper, has paid promptly all monies due defendant, and has established a substantial and profitable business.

7. The Publisher has followed a practice for many years up to the present time of publishing in its newspaper the Publisher's "suggested retail prices" for delivery by carriers of its newspapers to customers.

8. The Publisher has followed a practice for many years up to the present time of requiring that carriers of defendant's newspaper sell the St. Louis Globe-Democrat to subscribers at prices no higher than the Publisher's "suggested retail prices."

9. Plaintiff since about 1961 was charging his customers \$1.70 per month for the daily St. Louis Globe-Democrat, \$.20 for the weekend issue of the St. Louis Globe-Democrat, and \$.10 premium for Reader Insurance, if desired.

10. Defendant on May 20, 1964, sent a letter, a copy of which is marked Exhibit "A", attached hereto and made a part hereof, in which defendant stated that since plain-

tiff was charging subscribers more than the Publisher's "suggested retail prices", defendant was going to compete with plaintiff by selling its newspaper at retail itself, or for resale by another carrier.

11. In the aforesaid letter of May 20, 1964, defendant further stated it was sending to each resident of plaintiff's appointed territory an enclosed letter, a copy of which is marked Exhibit "B", attached hereto, and made a part hereof, in which defendant stated that plaintiff, an independent merchant, was charging more than defendant's "suggested retail price", and enclosing a form card, a copy of which is marked Exhibit "C", attached hereto, and made a part hereof, on which said persons were asked to advise defendant (1) if they had been paying over the suggested price, or (2) if they were a new subscriber, and in either event, defendant stated it would deliver its paper at the suggested retail price to such persons who returned said card to defendant.

12. Since May 20, 1964, defendant, its agents, servants and employees, have contacted plaintiff's customers and potential customers within plaintiff's said route, by telephone, and otherwise, and have advised said persons that plaintiff was overcharging them; that plaintiff was in a lot of trouble; that plaintiff was going to be replated and would no longer be delivering defendant's newspapers; that plaintiff was no longer delivering defendant's newspapers; that plaintiff was no longer in business; and that there were other carriers who were going to take plaintiff's place; all of which statements and representations were false, malicious, wilful, unlawful and without just cause, and were committed by defendant with the intent, purpose and object of hindering and preventing plaintiff from exercising his lawful trade or business and for the purpose of interfering with plaintiff's business, were injurious to trade or commerce, and unlawfully interfered with the free exercise by plaintiff of the distribution and

sale of defendant's newspapers to subscribers within plaintiff's route.

13. Upon information and belief plaintiff states that defendant unlawfully conspired, combined and colluded with a person or persons unknown to plaintiff for the purpose of injuring plaintiff's business and to prevent plaintiff from exercising his lawful trade and business by interfering, hindering, and preventing plaintiff from buying at wholesale and thereafter selling at retail defendant's newspapers to all persons within plaintiff's route who desire to subscribe thereto.

14. Defendant has threatened, intimidated and interfered with plaintiff's operation and management of his business, and has unlawfully conspired, combined and colluded with a person or persons unknown to plaintiff to the end that defendant has issued orders to plaintiff to stop delivering the St. Louis Globe-Democrat to hundreds of subscribers to whom plaintiff had sold said newspaper over a period of years, and from the retail selling of which plaintiff had derived substantial profit, and defendant, and said person or persons unknown to plaintiff, since May 20, 1964, have been and are now delivering and selling said newspaper to said subscribers at defendant's suggested retail prices.

15. Defendant did wilfully, unlawfully, intentionally and maliciously conspire, combine and collude as aforesaid with said third person or persons for the purpose of interfering with, disrupting and injuring plaintiff's business and for the further purpose of fixing, controlling, establishing and maintaining the retail prices at which plaintiff and other newspaper carriers sell the St. Louis Globe-Democrat to subscribers within their routes.

16. Plaintiff has sustained great loss and damage by virtue of said unlawful conspiracies, collusion, combinations and acts of defendant as aforesaid. Plaintiff has

lost business, property, credit, customers, patronage, and good will, his good name and reputation have been besmirched and damaged, and plaintiff has been prevented and deterred from continuing, expanding and increasing his said business; defendant and the person or persons with whom it unlawfully conspired, combined and colluded intended that plaintiff should be damaged, be put to expense and lose customers, trade and profits which plaintiff lost by reason of said unlawful conspiracies, collusion, combinations and acts of defendant as aforesaid, and which defendant and said person or persons intended to gain, and did gain for themselves all to plaintiff's loss, damage and detriment in the amount of Thirty-Five Thousand (\$35,000.00) Dollars actual damages, and defendant should be made to pay exemplary or punitive damages in the amount of Two Hundred Thousand (\$200,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant under Count I for actual damages in the sum of Thirty-Five Thousand (\$35,000.00) Dollars and exemplary or punitive damages in the sum of Two Hundred Thousand (\$200,000.00) Dollars and for his costs incurred herein.

Count II.

17. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 to 16 inclusive of this complaint with the same force and effect as though each and every allegation in said paragraphs were set forth in full herein.

18. During all of said times the Publisher has entered into contracts, agreements or understandings and has unlawfully conspired and combined with a person or persons engaged in the newspaper carrier business pursuant to which the Publisher has fixed, regulated, controlled, established and maintained the retail prices at which the St.

Louis Globe-Democrat may be sold to subscribers for home delivery in the Greater Metropolitan St. Louis area including the area in which plaintiff's newspaper route is located.

19. Each and all of the aforesaid unlawful conspiracies and combinations entered into by and between the Publisher and a person or persons unknown to plaintiff were in restraint of the trade and commerce of distributing and selling the St. Louis Globe-Democrat for home delivery in the Greater Metropolitan St. Louis area, and were accomplished and brought about by contracts, agreements and understandings between the Publisher and a person or persons unknown to plaintiff and the acts done pursuant thereto were in violation of and contrary to Sections 1 and 2 of Title 15, U. S. C. A., all to plaintiff's damage in the amount of Thirty-Five (\$35,000.00) Thousand Dollars, or treble said amount in the sum of One Hundred Five Thousand (\$105,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant under Count II in the sum of One Hundred Five Thousand (\$105,000.00) Dollars treble damages, plus a reasonable attorney's fee and for his costs incurred herein.

Plaintiff requests a trial by jury of all the issues herein pleaded.

BARTLEY, SIEGEL & BARTLEY,

By

130 S. Bemiston,

Clayton 5, Missouri,

Parkview 7-0922,

Attorneys for Plaintiff.

Exhibit "A".

St. Louis Globe-Democrat
Globe-Democrat Publishing Company
12th Blvd. at Delmar, St. Louis, Mo. 63101
GARfield 1-1212

May 20, 1964

Mr. Lester Albrecht
634 North Harrison
St. Louis, Missouri 63122

Dr. Mr. Albrecht:

The Globe-Democrat Publishing Company has received and referred to you a large number of complaints from customers in the territory you are servicing as a carrier, that you are charging subscribers more than the publisher's suggested retail prices.

The system we customarily follow of respecting, as exclusive, territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of overpricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves, or for resale by another carrier, at the lower prices in the overpriced territory.

In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter.

Yours very truly,

GLOBE-DEMOCRAT PUBLISHING
COMPANY,

WALTER I. EVANS,
WALTER I. EVANS,

Circulation Director.

WIE/rr

Exhibit "B".

St. Louis Globe-Democrat
Globe-Democrat Publishing Company
12th Blvd. at Delmar, St. Louis, Mo. 63101
GARfield 1-1212

Dear Mr. Albrecht:

It has come to our attention that some Kirkwood area readers of the Globe-Democrat who subscribe to our paper through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price. The suggested retail rate for the Globe-Democrat, for delivery by carrier, is \$1.60 per month for the daily paper, plus 20 cents for each issue of our Week-End paper. In addition, the premium on Reader Insurance is 10 cents per week, if desired.

If you are being charged more for the paper than our suggested retail rate, please advise us of this condition on the enclosed form and we will deliver the paper to you at the suggested retail rate.

If you are not a regular reader of our paper, we know that you will find the Globe-Democrat stimulating, informative and exciting. Please fill in the enclosed form and we will start service at once.

Sincerely

ST. LOUIS GLOBE-DEMOCRAT,
WALTER I. EVANS,
WALTER I. EVANS,
Circulation Director.

WIE/rr

Exhibit "C".

Deliver me the Globe-Democrat

☐ Daily ☐ Daily and Week-End

at your suggested retail price of \$1.60 per month plus 20¢ for each Week-End issue.

I have been paying over suggested price ☐

I am a new subscriber ☐

Name

Address

Telephone

Answer.

(Filed in U. S. District Court August 26, 1964.)

For its answer defendant admits, denies and alleges as follows:

1. Admits the allegations of Paragraph 1 except the word "owning", which is denied insofar as this word may have been used in the sense that defendant owns any rights in such route which obliged the defendant to sell to plaintiff, or to sell to him exclusively, its newspapers.

2. Admits the allegations of Paragraph 2.

3. Admits the allegations of Paragraph 3.

4. Admits the allegations of Paragraph 4 except the allegation "without cost to itself", which is denied.

5. Admits the allegations of the first two lines of Paragraph 5, but denies the balance thereof.

6. With the qualification of the word "owner" expressed in Paragraph 1 supra, the allegations of Paragraph 6 are true with respect to the period of time preceding the filing of suit.

7. Admits the allegations of Paragraph 7.

8. Admits the allegations of Paragraph 8.
9. States that it does not know whether the stated amounts were uniformly charged by the plaintiff during the period mentioned, but admits that such amounts were charged in certain instances.
10. Admits the allegations of Paragraph 10.
11. Admits the allegations of Paragraph 11.
12. Admits the allegations of the first two lines of Paragraph 12, but denies the balance thereof.
13. Denies the allegations of Paragraph 13.
14. Denies the allegations of Paragraph 14 except the allegation that it has issued "stop orders" to plaintiff with respect to certain subscribers during the period mentioned to whom it has sold its newspapers at its suggested retail prices.
15. Denies the allegations of Paragraph 15.
16. Denies the allegations of Paragraph 16.
18. Denies the allegations of Paragraph 18.
19. Denies the allegations of Paragraph 19.
20. Further answering, defendant states that the allegations of plaintiff's petition are insufficient to constitute a claim upon which relief may be granted.

Wherefore, having fully answered, defendant prays to be dismissed with its costs.

HOCKER, GOODWIN & MacGREEVY,
and LON HOCKER,
LON HOCKER,
Attorneys for Defendant,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100.

Supplemental Complaint.

(Filed in U. S. District Court)

Leave having been granted, Plaintiff, Lester J. Albrecht, files this as a Supplemental Complaint against the Herald Company, a corporation, d/b/a Globe-Democrat Publishing Company and shows that since the time when Plaintiff's Complaint was filed additional acts have been committed by the Defendant, to-wit:

1. That pursuant to and as a further part of the acts, conspiracies and combinations set forth in Counts I and II of the Complaint Defendant, The Herald Company, on August 21, 1964, notified Plaintiff by letter, marked Exhibit D, attached hereto and made a part hereof, that his relationship with The St. Louis Globe-Democrat as carrier was being terminated, and subsequently stated that on November 2, 1964, Defendant would cease selling Plaintiff newspapers; and that the delay in this termination was to give Plaintiff the opportunity to produce a substitute whose credit, experience and efficiency is satisfactory to Defendant; and that Plaintiff was, therefore, compelled and forced to sell his said newspaper route on or before November 2, 1964, at a price which was Twelve Thousand (\$12,000.00) Dollars less than the fair market value of said newspaper route.

2. As a direct result of these further additional acts by the Defendant, which continues the unlawful and wrongful interference with Plaintiff's business and contractual relations set forth in the original Complaint in Count I, and which continues the unlawful and wrongful actions of resale price maintenance set forth in Count II of the original Complaint, Defendant further injured the Plaintiff in that he has lost the profits reasonably to be expected from the operation of his business because of the act of terminating his relationship of carrier with the St. Louis Globe-Democrat. As a result of this termi-

nation, Plaintiff has suffered damages of loss of profit of \$13,000.00 annually for the reasonably foreseeable period during which he would have continued to operate this business of 8 years, being the length of time he has served as a carrier for the Globe-Democrat.

3. By reason of the above and foregoing, Plaintiff has suffered additional damages in the actual amount of \$116,000.00, and is entitled under Count I to additional actual damages in the amount of \$116,000.00, and under Count II, pursuant to Title 15, U. S. C. A., Section 15, to additional three-fold damages in the total amount of \$348,000.00.

Wherefore, the Plaintiff prays judgment from Defendant for said amounts of \$116,000.00 actual and \$348,000.00 treble damages, over and above and in addition to the amounts prayed for in the Complaint, together with interest thereon, costs and attorneys' fees.

Motion of Plaintiff for Summary Judgment.

(Filed in U. S. District Court December 10, 1964.)

Comes now the Plaintiff, Lester J. Albrecht, and moves the Court, pursuant to the provisions of Rule 56, Federal Rules of Civil Procedure, for Summary Judgment in his favor against the Defendant in each of Counts I and II of his Complaint as supplemented by his Supplemental Complaint against the Defendant on the fact of liability, but not on the amount of damages. As grounds for this Motion, Plaintiff, Lester J. Albrecht, states that there is no genuine issue as to any material fact as to liability and shows to the Court that:

1. Plaintiff is an individual who was engaged in the business of operating a newspaper carrier route known

as St. Louis Globe-Democrat Route No. 99 in the County of St. Louis, Missouri, since June 1, 1956, as admitted in Paragraph 1 of Defendant's Answer.

2. Defendant is engaged in commerce as defined in Section 12 of Title 15 U. S. C. A. and is engaged in activities affecting commerce, as admitted in Paragraph 2 of Defendant's Answer.

3. Plaintiff, as the operator of said route, has from June 1, 1956, purchased St. Louis Globe-Democrat newspapers from the Publisher, at wholesale, without the right to return any newspapers so purchased, and sold said newspapers at retail to numerous customers within said Route No. 99 with whom Plaintiff had entered into separate agreements to deliver to them the St. Louis Globe-Democrat; and from the time he purchased said route Plaintiff has faithfully performed all of his duties as a carrier of Defendant's newspaper, has paid promptly all monies due Defendant and had established a substantial and profitable business, all as admitted in Paragraph 6 of Defendant's Answer.

4. The Publisher (Defendant and its predecessor, the Globe-Democrat Publishing Company) has followed a practice for many years up to the present time of publishing in its newspaper the Publisher's "suggested retail prices" for delivery by carriers of its newspapers to customers, as admitted in Paragraph 7 of Defendant's Answer.

5. The Publisher (Defendant and its Predecessor, the Globe Democrat Publishing Company) has followed a practice for many years up to the present time of requiring that carriers of Defendant's newspapers sell the St. Louis Globe-Democrat at prices no higher than the Publisher's "suggested retail prices", as admitted in Paragraph 8 of Defendant's Answer.

6. Defendant on May 20, 1964, sent a letter (Exhibit "A" to the Complaint) in which defendant stated that since Plaintiff was charging subscribers more than the Publisher's "suggested retail prices", Defendant was going to compete with Plaintiff by selling its newspaper at retail itself, or for resale by another carrier, as admitted in Paragraph 10 of Defendant's Answer.

7. In the letter of May 20, 1964 (Exhibit "A" to the Complaint) defendant further stated it was sending to each resident of Plaintiff's appointed territory an enclosed letter (Exhibit "B" to the Complaint) in which Defendant stated that Plaintiff, an independent merchant, was charging more than Defendants "suggested retail price", and enclosing a form card (Exhibit "C" to the Complaint) on which said persons were asked to advise Defendant (1) if they had been paying over the suggested retail price; or (2) if they were a new subscriber, and in either event, Defendant stated it would deliver its paper at the suggested retail price to such persons who returned said card to Defendant, all as admitted in Paragraph 11 of Defendant's Answer.

8. Since May 20, 1964, Defendant, its agents, servants and employees, have contacted Plaintiff's customers and potential customers within Plaintiff's said route by telephone, as admitted in Paragraph 12 of Defendant's Answer.

9. Defendant has issued "stop orders" to Plaintiff to stop delivering the St. Louis Globe-Democrat to certain subscribers during the period mentioned to whom Defendant has sold its newspapers at its suggested retail prices as admitted in Paragraph 14 of Defendant's Answer.

10. Depositions on behalf of the Plaintiff have been taken of the Defendant's Business Manager, Circulation Director, Circulation Manager and another employee, and

of George John Kroner, a newspaper carrier, and such depositions were subsequently filed in this Court.

11. These depositions, the Affidavit attached hereto and made a part hereof, and the pleadings establish that there is no present genuine issue of fact as to the material allegations in Counts I and II of Plaintiff's Complaint as supplemented by his Supplemental Complaint.

12. The uncontroverted facts show that the Defendant did interfere with Plaintiff's business and contractual relations by inducing customers of Plaintiff by means of letters, telephone calls and door-to-door visits to cease to purchase their newspaper from Plaintiff, and that these acts of Defendant did in fact cause a substantial number of plaintiff's customers to cease dealing with Plaintiff to his injury.

13. The uncontroverted facts show that this interference with Plaintiff's business and contractual relations was not pursuant to a lawful right of the Defendant to engage in and compete in the business of door-to-door delivery of newspapers, but that defendant in fact had no intention of engaging in the business of a newspaper carrier, had no equipment necessary for a newspaper carrier, no employees for carrying newspapers, did not in fact engage in the carrying of newspapers except for a very short time on an emergency basis, asserted no proprietary or possessory interest in serving the customers taken away from Plaintiff, and in fact gave without any charge whatever the customer list so obtained to another who was engaged in the carrier business, and Defendant's actions constituted only simulated competition and not competition in good faith, and, therefore, constituted an unlawful injury to the business and contractual relations of Plaintiff.

14. The uncontroverted facts shown that Defendant combined with various customers of Plaintiff and with

George John Kroner, a newspaper carrier, to coerce and induce Plaintiff to comply with the resale price policy of the Defendant by writing letters, making phone calls and door-to-door solicitation to inform these customers that Plaintiff was selling at a price above the suggested resale price of Defendant and to urge and encourage them to stop buying their newspaper from Plaintiff unless he complied with the resale price policy of Defendant, and by combining and agreeing with George John Kroner to deliver newspapers to the customers taken away from Plaintiff at Defendant's suggested retail price, by giving new starts phoned in to the Defendant which by practice and agreement would be turned over to Plaintiff, to George John Kroner, thereby preventing Plaintiff from receiving new business to which he was entitled and by stating that Defendant would refuse to turn over new starts to a purchaser from Plaintiff.

15. That the pleadings show the uncontrovertible fact that Defendant terminated its relationship with Plaintiff on August 21, 1964, refusing to deliver newspapers to Plaintiff after November 2, 1964, and the aforesaid letter and the depositions show that this refusal to deal was caused solely because Plaintiff commenced this lawsuit in order to protect himself against the unlawful actions of Defendant in combination with Plaintiff's customers and George John Kroner to compel Plaintiff to comply with the resale price policy of Defendant, and therefore, is an unlawful termination.

Oral Argument requested.

State of Missouri }
County of St. Louis } ss.

Comes now Lester J. Albrecht, upon his oath being duly sworn, deposes and says that he is the Plaintiff in the

law suit of Albrecht v. The Herald Company, being Case No. 64 C 302(2) now pending in the United States District Court, Eastern District of Missouri, Eastern Division; that in operating his newspaper carrier business as an independent merchant as set forth in the Complaint and Supplemental Complaint he exercised his independent judgment and was since about 1961 charging his customers \$1.70 per month for the daily St. Louis Globe-Democrat; that he continued to charge said price of \$1.70 per month from 1961 up to June 12, 1964, when he was compelled as a result of the actions and conduct of The Herald Company in sending out the letters of May 20, 1964, as set forth in paragraphs 10 and 11 of the Complaint, in soliciting his customers by telephone and otherwise, to advise his remaining customers by written notice that his price as of that date was \$1.60 per month for the daily St. Louis Globe-Democrat; that he did not inform The Herald Company of his said reduction in price; that after he filed his said law suit against The Herald Company he was advised by it by letter dated August 21, 1964, that his relationship with it as carrier was terminated and that it would give him 60 days within which to produce a substitute; that The Herald Company subsequently extended the date on which it would cease selling newspapers to affiant from October 21, 1964, to November 2, 1964; that when affiant had agreed with another person upon the sale and sales price of affiant's said newspaper route The Herald Company advised affiant and said purchaser that the approximate 300 or more customers The Herald Company had taken away from Albrecht were no longer Albrecht's customers, but belonged to George John Kroner, and Albrecht could not, therefore, sell them; that The Herald Company would not recognize said purchaser as the exclusive carrier within Route 99, and would give all new start orders within Route 99 to George John Kroner and not to the purchaser from Albrecht; and that as a result of the aforesaid actions and conduct of The Herald Company, affiant

was compelled and forced to sell his said route as of November 2, 1964, and that the above and foregoing facts are true according to his best knowledge, information and belief.

LESTER J. ALBRECHT.

Subscribed and sworn to before me this 8th day of December, 1964.

BETTY L. LUTERAN,
Notary Public.

(Seal)

My Commission Expires Jan. 10, 1965.

This Act performed in the County of St. Louis which adjoins the City of St. Louis for which I am commissioned.

Order.

(Filed in U. S. District Court March 26, 1965.)

This matter is pending upon motion of the plaintiff for summary judgment as to the question of liability and on all issues except damages. The Court has been fully advised by briefs, oral arguments, affidavits, depositions and other exhibits which were filed in conjunction with the motion for summary judgment, and is of the opinion that there are material facts in dispute. Accordingly,

It Is Hereby Ordered that the plaintiff's motion for summary judgment be and hereby is overruled.

Dated this 26th day of March, 1965.

/s/ JAMES H. MEREDITH,
United States District Judge.

Stipulation.

(Filed in U. S. District Court May 4, 1965.)

Comes now Plaintiff, and hereby dismisses Count I of his Complaint by consent of Defendant.

BARTLEY, SIEGEL & BARTLEY

By **DONALD S. SIEGEL,**

and

GRAY L. DORSEY, by D. S.,

Attorneys for Plaintiff, Lester J. Albrecht.

HOCKER, GOODWIN & MacGREEVY,

By **LON HOCKER,**

Attorneys for Defendant,

The Herald Company.

Transcript of Trial.

* * * * *

Plaintiff's Evidence.

LESTER J. ALBRECHT

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Siegel.

Q. Will you state your name, please? A. Lester J. Albrecht.

Q. Where do you live, Mr. Albrecht? A. 634 North Harrison, Kirkwood, Missouri.

Q. How long have you lived there? A. I have lived at that address the past twelve years. I lived about a block away from there thirteen years prior to that.

Q. That would be about twenty-six years you have lived in Kirkwood, is that right? A. Yes.

Q. With whom do you live at that address? A. With Mrs. Albrecht and my daughter, who is away at school.

Q. How long have you been married, Mr. Albrecht? A. Twenty-eight years.

Q. Do you have any other children? A. Yes, sir, two.

Q. Those children are not living with you, they are grown? A. Yes, sir.

Q. And living with their own families now? A. Yes, sir.

Q. How old are you, Mr. Albrecht? A. Fifty.

Q. Where were you born? A. Chesterfield, Missouri.

Q. What date? A. November 13th, 1913.

Q. What is your business or occupation? A. Independent newspaper carrier.

Q. For how long have you been a newspaper carrier? A. Since June 1, 1956.

Q. What did you do before you became a newspaper carrier? A. I was employed by Pevely Dairy Company.

Q. How long did you work for Pevely Dairy? A. Sixteen years.

Q. Sixteen years? A. Yes, sir.

Q. What kind of work did you do for them? A. Worked as a milkman, that would be retail service, delivering milk from home to home.

Q. What kind of work did you do before you went to work for Pevely? A. I was with the White Baking Company.

Q. What kind of work did you do for them? A. Retail sales, delivering bread and bakery products.

Q. For about how long? A. Approximately four years.

Q. Mr. Albrecht, what education do you have? A. Eighth grade.

Q. After you completed the eighth grade, what kind of work did you do? A. I worked on the farm; I was born and raised on the farm, and various odd jobs, if I could find some in the neighborhood.

Q. Now you testified you first became a newspaper carrier on June 1, 1956. From whom did you buy your newspaper route? A. Mr. Louis Tullman.

Q. How much did you pay Mr. Tullman for the route? A. Eleven thousand dollars.

Q. Was that all cash? A. I paid Mr. Tullman all cash. I had to borrow the money, but I paid him all cash.

Q. From whom did you borrow the money? A. Mr. William Hoch.

Q. Did you have to give any security in order to obtain the loan? A. Yes. I signed a note and he held a deed of trust on my home.

Q. Has that deed of trust been paid off? A. Yes, sir.

Q. What did you actually receive for the eleven thousand dollars you paid Mr. Tullman?

Mr. Hocker: Your Honor, please, I object to that.

The Court: Was there a contract of sale?

Mr. Siegel: I don't believe so, Your Honor.

Mr. Hocker: I will withdraw the objection, Your Honor.

The Court: Proceed.

Q. (By Mr. Siegel) Will you answer the question? A. Will you repeat the question, sir?

Q. (By Mr. Siegel) what did you actually receive for the eleven thousand dollars you paid Mr. Tullman? A. The names and addresses of subscribers, an old truck and a tying machine.

Q. When did the Globe-Democrat learn that you purchased the route 99 from Mr. Tullman? A. Mr. Tullman and I went down to have the route transferred from him to me.

Q. Was that right around June 1, 1956, or just prior? A. A few days prior to that; yes, sir.

Q. Do you remember the gentleman who interviewed you for the Globe? A. Mr. John Wendell.

Q. What did he say to you? A. He told me the duties of a newspaper carrier, that they were long hours, that they were seven days a week, and that the Globe-Democrat wanted their money for the papers that I purchased once a week and that they wanted the papers delivered in good condition and on time.

Q. Was anything said about pricing? A. No, sir.

Q. Did the Globe approve you as a carrier? A. Yes, sir.

Q. Thereafter was it necessary for you to obtain any further approval from the Globe-Democrat, or did you continue delivering newspapers on route 99? A. No, sir.

Q. As long as you paid your bills to the Globe and delivered your papers to the customers you just continued along indefinitely as the carrier, is that correct? A. Yes, sir.

Q. Was the route that you purchased designated by any number? A. Yes, sir.

Q. What is the number? A. 99.

Q. What territory was included within route 99? A. The boundaries were Manchester Road on the north, Argonne on the south, the Glendale city limits and Kirkwood city limits on the east. On the west side, Geyer Road, and then it had a jog to Essex, to Harrison Avenue.

Q. Does that describe generally the area that route 99 covers? A. Yes, sir.

* * * * *

Q. Now Mr. Albrecht, will you explain the newspaper carrier business in connection with the operation of route 99, and your delivery of Globe-Democrat newspapers? Let me ask you first of all, from whom did you get the Globe-Democrat newspapers? A. Got them from the Globe-Democrat.

Q. What price did you have to pay the Globe-Democrat? A. Whatever price they billed me for.

Q. Was that what is known as the price that you were charged, what is known as the wholesale price? A. Yes, sir.

Q. You purchased these newspapers from the Globe and they became your newspapers, is that correct? A. Yes, sir.

Q. Let me ask you: You purchased a certain number of newspapers, let's say one thousand of the Globe-Democrat, but you were only able to deliver nine hundred fifty of those papers to customers on route 99. Could you return that extra fifty newspapers to the Globe-Democrat and get a credit or a refund for them? A. No, sir.

Q. So you had no right of return? A. That is right.

Q. The newspapers belong to you after you ordered and received them regardless of what you did or could do with them, is that correct? A. Yes, sir.

Q. Where would you receive the Globe-Democrat newspapers? A. We would pick them up at Manchester and Lindbergh, in front of Bettendorf's Market. We would get them from different deliveries. That was where we picked them up in the end, the last few years, but about the first two or three years we had to drive downtown to the plant to pick up the first group.

Q. By what means did you pick them up and transport them? A. At first I had this truck that I had bought from Mr. Tullman and I had, after that was no longer serviceable, I used a station wagon. At the end I used a Chevy carry-all.

Q. This station wagon and this carry-all, these vehicles, whose were they? A. They were mine.

Q. You purchased them yourself? A. Yes, sir.

Q. Paid for them yourself? A. Yes, sir.

Q. And maintained them? A. Yes, sir.

Q. After you received the newspapers, did you do anything with them before they were delivered? A. They had to be rolled and tied or wired or something to hold them together, and if the weather was bad or we thought it

might rain, or if it would be bad before the customer would pick them up, we would have to wrap them.

Q. Did you employ any help to perform these tasks and deliver the papers? A. Yes.

Q. What would they do? A. Whatever I would instruct them to do. Mostly tie them and wrap them.

Q. Generally, however, did you have help or did you deliver the newspapers yourself and do all of these things yourself? A. Most of the time I did it myself with the exception of weekends and on Sundays.

Q. Ordinarily what time did you leave home to pick up the papers? A. 1:30 A. M.

Q. After the papers were tied, were they ready for delivery? A. If they didn't have to be wrapped.

Q. On what occasion would you have to wrap the newspapers? A. If it was raining or we would always check the weather report and if they were predicting rain, or if it were cloudy as though it were going to rain, or if we had the idea that it would rain, we would wrap them to see that the customers had good service and had a newspaper that was readable.

Q. After they were tied and were wrapped, what did you do then? A. They were delivered.

Q. You would travel in your truck over the route and throw the papers to the customers? A. Yes, sir, I would drive and wrap and throw the papers as I went along when I was working by myself, which was most of the time. I wouldn't wrap them ahead of time, I would wrap them as I was driving.

Q. Would you stop along the way and wrap some then go forward, or wrap and tie as you went along? A. I would wrap a few to start out with, then I could drive and throw them and wrap others as I went along.

Q. How long would it take you to deliver all the papers to your customers? A. It would depend on the time we would receive them. Sometimes we would have to wait,

then sometimes we would have to wrap them, but I was usually finished by 6:00 A. M.

Q. After you finished delivering the papers to your customers, was there any more work for you to perform in the carrier business? A. Oh, yes. There was the billing of the customers, the keeping of records, there were phone calls. You answered the phone, and answering the phone would bring sometimes stop orders and you take stop orders and start orders. You list those start orders and stop orders in the record book to see that your customer received credit for the days they were away.

Q. Did you have to on any occasion go out and make further deliveries by reason of some customer who didn't receive his paper? A. Yes, sir.

Q. You mentioned start and stop. Would you mind explaining just what a start order was? A. A start order is an order to deliver to a customer and a stop order is an order to stop service.

Q. From whom did you receive the orders to start and stop? A. From the customers that would call, and we would also receive notice from the Globe-Democrat that were sent out with our papers, and sometimes customers would call and notify us.

Q. Did you receive telephone calls from customers the Globe-Democrat Circulation Department would turn over to you? A. Yes, sir.

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Q. From the time you first became a carrier on route 99, up to May 20th, 1964, did anyone else sell and deliver Globe-Democrat newspapers on route 99? A. Yes.

Q. Who? Who were these other persons? A. They had the so-called branch manager, they had their men on the corner selling them, they had racks or boxes where the papers were placed, and they had them in grocery stores, drug stores, confectionery stores; anyone that

would let them put in two to three papers to a dozen, or any amount, and sell them for them, they would place them there.

Q. Did these branch men or corner men, or any of their employees make any deliveries to homes or stores also in the same manner that you delivered newspapers? A. Yes, they did.

Q. Now Mr. Albrecht, where were these boxes or racks located within route 99? A. They were along all the main thoroughfares, along the bus lines where the bus stops, and almost every grocery store had newspapers in it for sale, confectionery stores and drug stores.

Q. How far from any of these boxes or racks or these stores do you estimate your customers throughout route 99 were located? A. Oh, from one to five blocks.

Q. Did you have any competition on route 99 from all these stores, the drug stores and grocery stores and confectioneries and these boxes or racks or these dealers or their employees? A. Yes, sir.

Q. Now when you first started delivering in June, 1956, how many days a week did you deliver Globe-Democrat newspapers? A. Seven.

Q. Was there any change in that routine? A. Yes.

Q. How and when did it take place? A. Yes, they went to a six-day delivery. That I mean, I'm not real sure of the date, I believe it was September, 1962, or '63, I'm not real sure.

Q. In any event, did that have any effect on your business? A. Yes, sir.

Q. What effect did it have? A. Well, it caused us to lose one day's pay a week.

Q. Was that decision reached to go to this weekend edition and the replacement of Saturday's and Sunday's newspaper that had been sold, was that a joint decision with the paper carriers and the Globe-Democrat, or was that decision made by the Globe alone? A. That was made by the Globe alone.

Q. Did the carriers receive anything to compensate or adjust for the loss of that newspaper? A. No, sir.

Q. Do you recall what price you charged for the Globe-Democrat in 1956, the daily Globe-Democrat and the Sunday Globe-Democrat at the same time? A. Whatever the suggested retail price was. I believe at that time it was a dollar thirty cents a month.

Q. Was it the Globe-Democrat that established for you and other carriers whatever prices you and the other carriers paid for Globe-Democrat newspapers from 1956 through October 31st, 1964? A. Yes, sir.

Q. In 1956 did the Globe-Democrat have anything to do with fixing or establishing the retail prices which carriers charged their customers for delivering Globe-Democrat papers to their homes? A. Yes, sir.

Mr. Siegel: I was wondering if I might have permission of the Court at this point to read some admissions and answers which I thought might fit in chronologically here.

Mr. Hocker I have no objection, Your Honor.

The Court: Very well. Proceed.

Mr. Siegel: I would like to read, if the Court please, from paragraph 7 of the Complaint and the response in the answer thereto.

Mr. Hocker: Just a minute. Let me find that.

Mr. Siegel: Paragraph 7.

Mr. Hocker: Okay.

Mr. Siegel: (Reading) "The publisher—" and I think we can agree that that means the defendant as it has been identified in the Complaint, Mr. Hocker?

Mr. Hocker: Yes.

Mr. Siegel: All right. With this agreement on that, (reading) "The publisher has followed a practice for many

years up to the present time of publishing in its newspaper the publisher's suggested retail prices for delivery by carriers of its newspapers to customers.

The answer to paragraph 7 admits the allegations of paragraph 7.

Paragraph 8 (reading) The publisher has followed a practice of many years up to the present time of requiring that carriers of defendant's newspaper sell the St. Louis Globe-Democrat to subscribers at prices no higher than the publisher's suggested retail prices.

In paragraph 8 of the answer, the defendant admits the allegations in paragraph 8 of the Complaint.

I wonder if we couldn't also agree on this, that is stipulated that that may be received in evidence, Your Honor, that is an ad that is published in the daily—daily in the St. Louis Globe-Democrat newspaper setting out the home delivery rate for the prices that, the retail prices that would be charged.

Mr. Hocker: Why don't you mark it as an exhibit?

Mr. Siegel: Will you mark this Plaintiff's Exhibit 1.

(Thereupon, the document above referred to was marked by the reporter for identification as Plaintiff's Exhibit 1.)

Mr. Siegel: May it be stipulated that what has been marked as Plaintiff's Exhibit No. 1 may be received in evidence?

The Court: Exhibit No. 1 may be admitted.

Mr. Siegel: Would you also mark these?

The Court: Will you identify Plaintiff's Exhibit No. 1 for the record.

Mr. Siegel: Plaintiff's Exhibit No. 1 is an ad that appeared, or appears daily in the St. Louis Globe-Democrat and I think we can stipulate that this same ad

would appear and did appear regularly, I think, from about 1961 up to the present time. It provides for a home delivery rate of daily and weekend Globes of two dollars and forty cents a month for a four weekend month. If I may, I think I can simply explain how that two dollars and forty cents is arrived at. I believe that covers four weekends at twenty cents each, or eighty cents, plus a dollar sixty cents for the suggested retail price for the dailies, making a total of two dollars and forty cents a month. Is that correct, Lon?

Mr. Hocker: Yes.

* * * * *

Mr. Siegel: Will you mark these Plaintiff's Exhibits 2, 3 and 4.

(Thereupon, the documents above referred to were marked by the reporter for identification as Plaintiff's Exhibits 2, 3 and 4 respectively.)

Q. (By Mr. Siegel) Mr. Albrecht, how did defendant notify you of changes in the wholesale and retail rates?
A. By mail; by letter.

Q. I will show you what has been marked Plaintiff's Exhibit 2, 3 and 4, and hand you those and ask you if you will identify what those exhibits purport to be, starting with them in their numerical order.

* * * * *

Q. (By Mr. Siegel) All right, Mr. Albrecht, will you first state what Plaintiff's Exhibit 2 purports to be. A. That is the notice that I received that with the effective date of July 23rd that the wholesale rate to the carriers would be four dollars and forty cents per hundred.

Q. From whom did you receive that letter? A. The Globe-Democrat; it is signed by Walter I. Evans.

Q. What is the date of that letter? A. July 19th, 1962.

Q. Can you identify Plaintiff's Exhibit 3? A. Yes, sir. That is the notice that the suggested advertised retail price of the weekend Globe-Democrat will be increased to twenty cents per copy. It formerly was fifteen cents prior to this.

Q. From whom was that letter? A. This was also from the Globe with Mr. Walter I. Evans' signature.

Q. What is the date of that letter? A. October 18, 1963.

Q. All right. Plaintiff's Exhibit 4, will you identify that? A. That is a notice dated July 15th, 1964, non-subscribers will be offered delivery of the daily or daily and weekend Globe-Democrat for a three months' period of half price provided they take a reader insurance policy. This is one of their promotion letters and they used telephone solicitation to contact the people with.

Q. What is the date of that letter? A. July 15th, 1964.

Q. Does that letter say anything about the retail price at which those papers should be sold by carriers? A. Unlike past campaigns of this nature, there will not be a free period and a charge period. You will start billing immediately but at half the regular rate.

Mr. Siegel: I see. All right. I would like to offer Plaintiff's Exhibits 2, 3 and 4 in evidence.

Mr. Hocker: No objection.

The Court: They may be received.

* * * * *

Q. Mr. Albrecht, were you employed by the Globe-Democrat and thereafter by The Herald Company during any of this period of time while you were delivering Globe-Democrat newspapers from June 1, 1956, through October 31, 1964? A. No, sir.

Q. Were you then in business for yourself as a newspaper carrier during this period of time? A. Yes, sir.

Q. Were you the sole proprietor or owner of that carrier business? A. Yes, sir.

Q. Did you employ your own help when you needed it?

A. Yes, sir.

Q. Did you buy and use your own delivery and other equipment in making deliveries of the Globe-Democrat newspaper? A. Yes, sir.

Q. Where does your profit come from in the newspaper carrier business? A. The difference between the wholesale rate we paid and the price that the customers paid us less expenses, was our profit.

Q. What kind of expenses did you have in the carrier business? A. There was gas and oil, upkeep of the truck and equipment; there was string, wire, delivery bills, postage, telephone bills and repairs on the truck, tires, employees, any employees that we employed had to be paid. There was a tax service for income tax purposes, there was insurance.

Q. Did you have to collect any of the— A. Collecting agencies for customers that we had not or could not collect from.

Q. Is that for the most part the kind of expenses that you would have in this carrier business? A. Yes, sir.

Q. By the way, did you also deliver the Post-Dispatch for the Pulitzer Publishing Company for a time? A. On Sunday only.

Q. Aside from any difference in the wholesale and retail price, was there any difference between the duties and kind of operation as between a carrier for the Post-Dispatch and a carrier for the Globe-Democrat? A. No, sir.

Q. In 1961, what was the retail price that you charged to your customers within route 99? A. The first part, I think, was a dollar forty cents.

Q. At that time what was the suggested, the defendant's suggested retail price? A. One dollar thirty cents.

Q. Did those change in 1961? A. Yes. It changed to a dollar sixty cents, was the defendant's suggested retail price, and I charged a dollar seventy cents.

Q. Will you state what the occasion was for charging more than the defendant's suggested retail price?

* * * * *

A. They had, the defendant had changed their prices and that is the reason that the price change was made; in fact, in the beginning of 1961 we were getting the price of the week-end paper, or Sunday paper at that time was twenty cents. It was reduced to ten cents per copy and that also cut our profits by approximately two and a half cents per copy of each Sunday paper.

Q. What did— A. The price of a dollar sixty—that is the time that the defendant had changed its wholesale rates and its retail rates or suggested advertised prices.

Q. Did you make this change in price yourself as an independent merchant? A. Yes.

* * * * *

Q. (By Mr. Siegel) In any event, what did you do with respect to the price? A. I charged the price that I had decided to charge. I did not go along with the defendant's suggested retail price. I did on the weekend copies, the weekend issues, I did charge their suggested rates, but not on the daily.

Q. Was this a decision that you reached yourself? A. Yes, sir.

Q. And based on your own independent judgment? A. Yes, sir.

Q. Did you charge all customers in excess of defendant's suggested retail price for the dailies? A. No, sir. I did not charge anyone the excessive price if they paid in advance.

Q. Were there any of your customers within route 99 who did pay in advance? A. Yes, sir.

Q. Do you recall any of their names? A. There was Mr. Reddington, Mrs. Bayer, Mr. Lear and Diercker.

Q. What price did you charge them for the dailies? A. The suggested, defendant's suggested retail price.

Q. When did your customers ordinarily pay their monthly bills to you? A. Some paid once a month, some every two months, some three months, some four months, some six months, some as long as a year, some never did pay.

Q. Did anyone from the Globe-Democrat ever call you about charging more than the defendant's suggested retail price? A. Yes, sir. Mr. Evans did.

Q. When did he first call you? A. In 1961.

Q. What did he say, and what did you say? A. He said that he had reference that I was charging more than the suggested retail price and that the Globe-Democrat could not tolerate that, that they had to control the price, and I had to charge the suggested retail price.

Q. Did you reach any understanding with him at that time? A. No, sir.

Q. Did you continue to charge more than the defendant's suggested retail price for delivering Globe-Democrat newspapers to your customers? A. Yes, sir.

Q. Did any other carrier charge more than defendant's suggested retail price? A. Yes, sir.

Q. Did Mr. Evans thereafter call you any further with respect to your charging more than the defendant's suggested retail price? A. Yes, sir, he did.

Q. When did he next contact you? A. The next time he contacted me was by phone. He suggested, or he said I understand you are charging more than the suggested retail price. He said we cannot put up with it. You will have to charge the suggested retail price. At that time I told Mr. Evans I was an independent merchant, that I was not an employee of the Globe-Democrat, that I bought the newspapers from them, paid them cash for them. I had to deliver them, bill them, see that all expense for operation to get them to the readers was taken care of, and they paid no old-age pension or anything that way. We had no vacation, they paid nothing to us, to the car-

riers as employees, so therefore I told him I thought I was——

Mr. Hocker: Object to what he thought, Your Honor.

The Court: Sustained. You may testify what you said, not what you thought.

Q. (By Mr. Siegel) What did you say, did you say anything further to him during that conversation? A. No, sir. Mr. Evans hung up.

Q. He hung up on you? A. Yes, sir.

The Court: When was this conversation, you didn't say when this was. This second conversation.

A. I don't remember the exact date, but it was, to the best of my knowledge, in 1962.

Q. (By Mr. Siegel) Did you ever receive a letter from Mr. Evans about the price you were charging? A. Yes, sir.

Mr. Siegel: Will you mark this Plaintiff's Exhibit 5.

(Thereupon, the document above referred to was marked by the reporter for identification as Plaintiff's Exhibit No. 5.)

Q. (By Mr. Siegel) Mr. Albrecht, I will show you what has been marked Plaintiff's Exhibit 5, and ask you if you can identify what this exhibit purports to be. A. Yes, sir.

Q. What is that? Is that the letter you received from Mr. Evans? A. This is the letter that I received from Mr. Evans.

Q. What is the date? A. June 1st, 1962.

Mr. Siegel: I would like to offer this letter in evidence, Your Honor.

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The Court: There is no objection to this?

Mr. Hocker: No, sir. No objection.

The Court: It may be received.

Q. (By Mr. Siegel) Mr. Albrecht, will you read that letter? A. (Reading) Mr. Lester Albrecht, 634 North Harrison, Kirkwood 22, Missouri. Dear Mr. Albrecht: From the enclosed notices it appears that you are charging a dollar seventy cents per month for the daily Globe-Democrat in spite of our published announcement that the price is a dollar sixty cents.

It is the policy of the Globe-Democrat not to deal with carriers who charge their subscribers more than the published rates, and if after this warning you persist in charging at the higher rate, we will take whatever legal steps appear to be necessary to effectuate our position. Yours very truly, Globe-Democrat Publishing Company, Walter I. Evans, Circulation Director.

That is dated June 1st, 1962.

Q. Now after you received that letter, Mr. Albrecht, did you have any meeting with Mr. Evans? A. Yes, sir. And with Mr. Bauman.

Q. About when did that meeting take place? A. Shortly after I had received that letter.

Q. Where did that meeting take place? A. In Mr. Evans' office at the Globe-Democrat.

Q. What did you say and what did Mr. Evans and Mr. Bauman say at that meeting? A. Mr. Evans told me at that time that he would not talk to me unless in the presence of Mr. Bauman, so he called Mr. Bauman in and I don't recall just what the first words were said—

Mr. Hocker: Let me interrupt one second. I think it would be well for Mr. Bauman to hear what this man says, if you wait a minute while I get him.

Mr. Siegel: That is all right.

(At this point Mr. Hocker stepped outside the court room and brought Mr. Bauman back who had left the court room.)

Q. (By Mr. Siegel) Mr. Albrecht, did Mr. Evans identify who Mr. Bauman was? A. Yes, sir.

Q. Who did he say he was? A. Mr. Bauman.

Q. Did he indicate what office or what position or connection he had? A. The business manager.

Q. Did he state whether or not he was an attorney? A. Yes, sir.

Q. All right. What conversation followed after that? A. Mr. Bauman asked what shall we talk about. I said I am here for one reason and that is because I received this letter with Mr. Evans' signature on it. Mr. Bauman then stated—they said that they would have to control the suggested retail prices, they would have to control the prices. That unless they did some carrier may charge—they could charge whatever they wanted, they could charge ten dollars a month if the customer was willing to pay it, and of course I told him at that time that it would be a little ridiculous to try to charge ten dollars a month for the delivery of a newspaper. He said well, at the same time they could not tell me what to charge, but if I did not charge their suggested retail price that they would not have to do business with me. I then asked him if that wasn't a different interpretation of telling me what I had to charge. It was just using different words. In other words, to charge that suggested retail price or else.

Q. What did he say, if anything? A. Mr. Evans or Mr. Bauman, neither one, gave me an answer to that.

Q. Was there any further conversation that took place at that time? A. They told me at that time, that is, Mr. Evans said I would advise you not to use that bill with the dollar seventy cents printed on it, and I had been using that bill, that I should never use that bill any more to any of my customers.

Q. Are you referring to the bill that you had the price of a dollar seventy cents printed thereon? A. Yes, sir.

Q. Was there any further conversation at that meeting?

A. That—to my knowledge, no.

Q. All right. After that meeting, did you continue to charge the price that you decided in your own judgment as an independent merchant to charge your customers?

A. Yes, sir.

Q. From the time, Mr. Albrecht, you started charging the retail price that you determined up to May 20th, 1964, did you, to your knowledge, lose any customers as a result of the price that you charged? A. Yes, a few.

Q. Can you state about how many? A. Half a dozen.

Q. Over the three-year period, from 1961 into 1964? A. About half a dozen.

Q. How many customers did you have on route 99 on May 20th, 1964? A. Twelve hundred one dailies, eleven hundred eighty-nine weekends.

Q. Now as of May 29, 1964, you had been engaged in the carrier business delivering Globe-Democrat papers for almost exactly eight years, had you not? A. Yes, sir.

Q. Over this period of time had you performed all your duties as a carrier of the Globe-Democrat paper? A. Yes, sir.

Q. Had you paid promptly all the money to defendant? A. Yes, sir.

Q. Did you have an investment in delivery and other equipment? A. Yes, sir.

Q. Had you built up patronage and goodwill on route 99? A. Yes, sir.

Q. Did you expect to continue to operate that paper route? A. Yes, sir.

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Mr. Siegel: I would like to offer Plaintiff's Exhibits 6, 7 and 8 in evidence, Your Honor.

Mr. Hocker: No objection, Your Honor.

The Court: They may be received.

Q. (By Mr. Siegel) Mr. Albrecht, would you mind reading if you will, aloud, Plaintiff's Exhibits 6, 7 and 8? A. (Reading) May 20, 1964. Mr. Lester Albrecht. 634 North Harrison, St. Louis, Missouri 63122. Dear Mr. Albrecht: The Globe-Democrat Publishing Company has received and referred to you a large number of complaints from customers in the territory you are servicing as a carrier that you are charging subscribers more than the publisher's suggested retail price.

The system we customarily follow of respecting as exclusive territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of over-pricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves or for resale by another carrier at the lower prices in the over-priced territory.

In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter. Yours very truly, Globe-Democrat Publishing Company, Walter I. Evans, Circulation Director.

Q. Now will you read Plaintiff's Exhibit 7 and let me, before you do that, ask you do you know whether this was a letter that went out to all the residents of your territory within route 99? A. Exhibit No. 7?

Q. Yes, sir. A. Yes, it is.

Q. As a matter of fact, did that letter go out to your knowledge to more than the persons who were customers of yours within route 99? A. Yes, sir.

Q. Now let me ask you: there is some reference in Plaintiff's Exhibit 6 to a large number of customers' complaints about which the defendant had advised you, how many complaints did defendant advise you that it had with respect to your pricing policy? A. I don't know the exact number; probably half a dozen.

Q. Will you proceed to read Plaintiff's Exhibit 7. A. (Reading) Dear Mr. Albrecht: It has come to our attention that some Kirkwood area readers of the Globe-Democrat who subscribe to our paper through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price. The suggested retail rate for the Globe-Democrat for delivery by carrier is a dollar sixty cents per month for the daily paper, plus twenty cents for each issue of our weekend paper. In addition, the premium on reader insurance is ten cents per week, if desired.

If you are being charged more for the paper than our suggested retail rate, please advise us of this condition on the enclosed form and we will deliver the paper to you at the suggested retail rate.

If you are not a regular reader of our paper, we know that you will find the Globe-Democrat stimulating, informative, and exciting. Please fill in the enclosed form and we will start service at once. Sincerely, St. Louis Globe-Democrat, Walter I. Evans, Circulation Director.

Q. And this letter, Plaintiff's Exhibit 7, was the letter that was sent out to all the residents within your territory, route 99, is that correct? A. Yes, sir.

Q. Now read what is stated on Plaintiff's Exhibit 8. A. (Reading) Deliver me the Globe-Democrat, then it has a little box beside it, the word daily; another little box, the words daily and weekend, at your suggested retail price of one dollar sixty cents per month with twenty cents for each weekend issue.

I have been paying over suggested price. Then a little box to check.

I am a new subscriber, with a little box to check. Then it has name, address, telephone.

Q. Was there a box to check as to whether or not the subscriber, or your customers, were paying over the defendant's suggested retail price? A. Yes, sir.

Q. All right. Now after those letters of May 20th, 1964, were sent out to you and to all the residents of your territory, together with that card, what happened next? Did you hear from any of your customers? A. I heard from a lot of them. The phone would ring and a lot of people calling cursed me, called me a cheat and a thief, and a lot of the people that I knew for some twenty years, would walk by me, wouldn't even talk to me. I think on the morning of the 25th following that letter, I received stop orders from the Globe-Democrat along with my newspapers, to stop delivery of the newspaper to the customers. I acknowledged those stops for two or three days, then I started getting notices to stop newspapers from people that were not even customers of mine. After I got them I couldn't acknowledge them anymore, because they were telling me to stop newspapers for Mr. and Mrs. So-and-So, and I wasn't even delivering a newspaper to them.

Q. Did any of your customers and acquaintances who received those letters speak or act toward you any differently in any other way than you have previously testified about after May 20th, 1964? A. Yes, a lot of them I even noticed in church. I would sit down in church on Sunday morning and people got up and moved out of the pew I was sitting in and moved to another one.

Q. Did you—you stated that you received some stop orders shortly after, or some few days after May 21st, 1964, for how long did you continue to receive an unusual amount of stop orders, if this was an unusual amount? A. This is a very unusual amount. I did for quite some time. After the letter, then the telephone soliciting followed, the door-to-door soliciting followed to get my customers and I was continuously losing customers.

Q. Will you describe any other effects that these letters that the defendant sent out to your customers had on your carrier business? A. Well, it took some three hundred-odd customers that I had, and that caused me

a loss of profit and my expenses were the same because these customers were—there would be one here I would deliver to, maybe they would telephone me and I still had to cover the same territory, I had to cover the same amount of mileage and territory and my expenses continued to be the same.

Q. I see. There would only be one here and there and you would have to cover the same territory that you had previously been covering before the letter of May 20th, is that correct? A. Yes, sir.

Q. Do you know who began delivering Globe-Democrat newspapers to those persons from whom you had received stop orders from the defendant? A. An employee of the Globe-Democrat, Mr. Boyd.

Q. Did you actually observe him delivering newspapers to your customers on route 99? A. Yes, sir.

Q. How would that happen that you observed him doing that? A. As I explained, we were both covering the same territory. He didn't go exactly the same way I did, but we would meet in different places. I would pass him on the street. Sometimes he would be going the opposite direction, sometimes he would be coming, and sometimes I would be coming in back of him; and newspapers were also delivered by Mr. Dorway.

Q. Dorway? I believe that is D-o-r—Is that a single "o" or a double "o"? A. Single "o".

Q. D-o-r-w-a-y. He is an employee of the Globe-Democrat, too? A. Yes, sir.

Q. Is he some official in the Circulation Department? A. I think he has some title.

Q. Now I think you mentioned that the defendant engaged in some additional conduct as a result of which you lost more customers. You mentioned telephone and door-to-door solicitation. Do you know who did the telephone solicitation? A. The Milne Service.

* * * * *

Q. (By Mr. Siegel) Do you know whether or not the defendant through Milne Sales Circulation Service, Incorporated, engaged in any door-to-door solicitation of your customers within route 99? A. Yes, sir.

Q. Do you know that of your own personal knowledge? A. I was told that.

Q. All right. Did you continue—for how long did you continue receiving stop orders from the defendant for customers, your customers within route 99? A. As long as I—until I sold the route.

* * * * *

Mr. Siegel: Will you mark this Plaintiff's Exhibit 9.

(Thereupon, the document above referred to was marked by the reporter for identification as Plaintiff's Exhibit No. 9.)

Mr. Hocker: That whole batch of papers is Exhibit 9?

Mr. Siegel: Yes.

Q. (By Mr. Siegel) Mr. Albrecht, I will hand you what has been marked Plaintiff's Exhibit 9, and ask you if you will identify what the top sheet thereon purports to be. A. This is a list of stop orders that was sent to me by the Globe-Democrat. They were not sent to me in a form such as this, they were individual sheets with each individual customer's name and address, and they stopped the subscriptions.

Q. Is that the letter that appears on the top thereof? A. Yes, it is.

Q. What is the date of that letter? A. July 1st, 1964, and it is signed by Mr. Walter I. Evans, Circulation Director, St. Louis Globe-Democrat.

* * * * *

Q. (By Mr. Siegel) To whom is that letter addressed? A. Mr. Lester J. Albrecht.

Q. Did you receive that letter, Mr. Albrecht? A. Yes, sir, I did, by special delivery.

Q. All right. A. With the group, the whole thing as a group.

Q. Will you identify what those enclosures that you received with that letter are? A. Those are names, a list of the names and addresses with the dates listed in front, the name and address of the customers that they had previously sent me stop orders on.

Q. Was that a list then of all the stop orders that had been sent to you by the defendant asking you to stop delivering to all those customers up to that date of that letter? A. Yes, sir, it is.

Mr. Siegel: I will ask that Plaintiff's Exhibit 9 be received in evidence, Your Honor.

Mr. Hocker: No objection.

The Court: It may be received.

Q. (By Mr. Siegel) Let me ask you another question on this Exhibit 9, Mr. Albrecht. Will you look at that exhibit or the enclosures therein and state what is the first date that a stop order or a number of stop orders were sent to you by the defendant on your customers? A. May 25th, 1964.

Q. Now did those stop orders continue after that? A. Yes.

Q. Each day as shown, or can you indicate or state that from that exhibit? A. These are the ones that they are dated May 25th, 1964. There is one, two, two and a portion of another page dated May 26th, 1964; and May the 27th, and there is one May 28th, June 2nd, June 3rd, June 4th, June 6th, June the—there is June the 5th prior to that. June 6th, and another one for June 5th; there is another one for June 6th.

Q. Well— A. June 8th.

Q. Let me interrupt you for a moment, Mr. Albrecht. Will you just glance at those and state whether or not those stop orders continued every day or just about every day, during the month of June, 1964, and up until what date? A. Yes, sir. This date here is including June the 30th. There is a bad job on this, part of it is hard to read. July 27th was the last on this list.

Q. Where—— A. There were more than that; that was the date that this list was sent to me.

Q. I notice on this list on this last one from where you got the date July the 7th is later than the date of the letter. Were there some additional stops that you received after this letter of July 1st? A. Yes, sir.

Q. Thank you. Now did the same employees of the defendant that you have previously identified, Mr. Albrecht, continue to deliver Globe-Democrat papers to the customers that you had previously been serving and from whom you had received stop orders from the defendant? A. Yes, sir.

Q. Do you know for how long they continued to deliver those Globe newspapers to the customers of yours that had been taking from you? A. Not the exact date, but it was some time in July, I believe, that Mr. Kroner had started to deliver.

Q. Now—— A. It is possible it could have been in August.

Q. Do you know who Mr. Kroner is? A. Mr. Kroner is a—he is another carrier whom the Globe-Democrat gave these customers of mine to.

Q. Now during the month of June, did you take any action as a result of defendant's letters, telephone and door-to-door solicitation with respect to your price? A. Yes, sir, I did.

Q. What did you do, and why? A. I lowered my price to their suggested retail price. I gave notice to all my customers because of the pressure that the Globe-Democrat

was putting on me, I definitely could not stay in business as I——

* * * * *

Q. (By Mr. Siegel) Now this price that you reduced this to, did you communicate to your customers anything in writing with respect to what your price was going to be from whatever date it was that you so notified your customers? A. Yes, sir.

Mr. Siegel: Will you mark this Plaintiff's Exhibit 10.

(Thereupon, the document above referred to was marked by the reporter for identification as Plaintiff's Exhibit 10.)

Q. (By Mr. Siegel) Mr. Albrecht, I will show you what has been marked Plaintiff's Exhibit 10, and ask if you will identify what that document purports to be? A. That is the price list that I distributed to my customers.

Q. What is the price indicated on Plaintiff's Exhibit 10 for the daily, per month? A. Daily, one price, one dollar sixty cents per month. Weekends, twenty cents per copy, which was the same as the defendant's suggested retail price.

Mr. Siegel: I would like to offer Plaintiff's Exhibit 10 in evidence, Your Honor, please.

The Court: Any objection?

Mr. Hocker: No objection.

The Court: It may be received.

Q. (By Mr. Siegel) Now Mr. Albrecht, did you meet with any representatives of defendant after May 20th, 1964, and before August 21, 1964? A. Yes, sir, I did. I met with Mr. Bauman.

Q. What did he say?

The Court: When did you meet with Mr. Bauman? Identify the time and place.

Q. (By Mr. Siegel) All right. Can you identify where you met with Mr. Bauman? A. I met with Mr. Bauman at his office in the Globe-Democrat Building.

Q. Do you recall the date? A. July the—I am not real sure, I believe it was July the 27th.

Q. 1964? A. 1964.

Q. What did Mr. Bauman say to you? A. Mr. Bauman said that the Globe-Democrat was not in the newspaper carrier business, that it does not want to be in the newspaper carrier business, and that they would be happy if I would take these customers back and deliver them the newspapers to them so long as I charged the suggested retail price.

Q. Was there anything further said at that meeting that you can recall? A. Not offhand that I can recall.

Q. Now after that meeting, what did you do next? A. I made an appointment with you, Mr. Siegel, here, to file suit against the defendant for the damage that I had sustained through them delivering to my customers and taking these customers away.

Q. Now Mr. Albrecht, after that lawsuit was filed, what happened next? A. I received a notice that I was being terminated as a carrier.

Q. Who did you receive this notice from? A. I received a copy of it from you that they were terminating me as a carrier and that I would have sixty days to find a buyer for my route.

* * * * *

Q. (By Mr. Siegel) Mr. Albrecht, I will hand you what has been marked Plaintiff's Exhibit 11, and ask you if you can identify that document, what it purports to be? A. Yes. This is a letter dated August 20th, 1964, notifying me that they were terminating me as a carrier.

Q. Who signed that letter, Mr. Albrecht? A. Walter I. Evans, Circulation Director.

Q. Does that letter indicate how many days or on what date you were to be terminated? A. It says sixty days.

Q. Sixty days? A. Sixty days from the date, which would be October 21st.

The Court: Now is October the 21st the day of termination or is that the date of the letter? A. The date of the letter is August 21st. Here at the bottom it says we shall cease selling you newspapers on October 21st, 1964. In the meantime, we will be ready to interview any substitute you may wish to produce.

Q. (By Mr. Siegel) Does that letter indicate that you would be terminated immediately as to the date of that letter?

* * * * *

A. (Reading) August 21st, 1964. Mr. Lester Albrecht. 634 North Harrison, St. Louis, Missouri 63122. Dear Mr. Albrecht: We have received a copy of the Complaint which you have filed in the U. S. District Court asking damages from us in the amount of three hundred forty thousand dollars.

It seems apparent that the prosecution of this action is clearly inimical to the purpose for which your appointment as carrier was made and you are hereby notified that your appointment as carrier is terminated.

However, in accordance with our statement of policy, we will nevertheless give you the opportunity of producing a substitute whose credit, experience and efficiency is satisfactory to us, and we will not object to his appointment on the ground that he may be paying you in connection therewith. Under the circumstances, with the lawsuit pending, we believe that sixty days is a reasonable time for this purpose.

Accordingly, we shall cease selling you newspapers on October 21st, 1964. In the meantime, we will be ready to interview any substitute you may wish to produce. Yours very truly, Walter I. Evans, Circulation Director.

Q. Then the defendant gave you sixty days, not ninety

days, within which to sell your route, isn't that correct?
A. Right.

Q. Did the defendant give you an additional extension of thirty days over that sixty days within which to sell your route? A. No, sir.

Q. How much extension of time was given from the date of October 21, 1964? A. To the end of October, 1964.

Q. Did you make that request? A. Yes, sir, I did.

Q. Why did you make that request? A. To simplify the billing of the customers. It would make a lot of extra work for me. It would make a lot—making out the bills for part of a month would make a lot of extra work for the man who was appointed to bill for those few days and it would also confuse the customers as to what days they were to pay me and for what days their records would be that they would have to pay this man.

* * * * *

Q. (By Mr. Siegel) Do carriers bill monthly? Did you bill monthly? A. I billed monthly, yes, sir.

Q. Now, I don't believe I asked you, Mr. Albrecht, with respect to Plaintiff's Exhibit 10 as to when you notified your customers that you were reducing your price to one dollar sixty cents per month for the daily Globe. A. It was on June the 12th. The price was retroactive to June the 1st.

Q. Thank you. Now, after you received that notice that the defendant was going to cease selling you newspapers as of October 21st, 1964, did you make any attempt to sell your route 99? A. Yes, sir, I did, I advertised it.

Q. Did you receive any offers? A. Yes, sir, I did.

Q. What was the first offer you received? A. Mr. Max Horing.

Q. I believe that is H-o-r-i-n-g? A. He offered me seventeen thousand dollars.

Q. He offered you seventeen thousand then? A. Yes, sir, seventeen thousand dollars.

Q. Did you accept that offer? A. I did not at that time accept it. Mr. Horing said that—

Q. Don't tell us what Mr. Horing said. I just asked you if you accepted the offer. A. I did not.

Q. Did you receive any further offers? A. Yes, sir, I did.

Q. From whom did you receive another offer? A. Mr. Schwarzenbach.

Q. I believe that is S-c-h-w-a-r-z-e-n-b-a-c-h? You received another offer from Mr. Eugene Schwarzenbach? A. Yes, sir.

Q. What was the amount of that offer? A. Twenty-four thousand dollars.

Q. Did you accept that offer? A. Yes.

* * * * *

Q. (By Mr. Siegel) Did Mr. Schwarzenbach make an oral offer to you orally? A. Yes, sir.

Q. What was the amount of that offer, Mr. Albrecht? A. Twenty-four thousand dollars.

Q. Did you orally tell him that you accepted that offer or not? A. Yes, sir, I did.

Q. You did what? A. I did accept it.

Q. Now was it then necessary to obtain the approval of the Globe-Democrat of Mr. Schwarzenbach in order to consummate the arrangement with him? A. Yes, sir.

Q. Did you make any arrangements to meet with any representative of the defendant? A. Yes, sir, I did.

Q. Do you recall on what date you met with them? A. September 15th, 1964.

Q. Where did you meet? A. At the office of the Globe-Democrat in Mr. Evans' office.

Q. Who was present at that meeting? A. Mr. Evans, Mr. Cleaver, Mr. Bauman, Mr. Schwarzenbach and myself.

Q. What was said at that meeting? A. Mr. Bauman told Mr. Schwarzenbach at that time that he would not buy the twelve hundred customers that I had, that he

would buy eight hundred seventy-one customers. He would not get start orders and he would never get start orders and that he would not have an exclusive territory but that it was like buying an apartment with leases in it, or like buying a piece of property with an easement through it, that he would have competition on this route unless I would drop the lawsuit against the Glöbe-Democrat, then I would have to buy the customers from Mr. Kroner who they had given them to, and I could either operate it myself as an independent merchant or sell it to Mr. Schwarzenbach or whoever I wanted to so long as I charged the suggested retail price.

Q. So long as you charged the suggested retail price?

A. Yes, sir.

Q. Did Mr. Bauman say anything—Was that the substance of what was said at that meeting? A. No.

Q. Was there anything further said? A. Mr. Bauman said he didn't expect an answer from us at that time but it was something for me to think over about dropping the lawsuit.

Q. Were you to let him know then? A. To think it over and let him know.

* * * * *

Q. (By Mr. Siegel) When did you next, if you did, meet with Mr. Schwarzenbach? A. The following day.

Q. Where did you meet? A. I met with Mr. Schwarzenbach at his place of business on 159 West Argonne in Kirkwood.

Q. Did you go over and make arrangements to go over and see him at his place of business? A. Yes, sir, I did.

Q. Don't tell me what the conversation was, but did you have any conversation with him about the sale of your route? A. Yes, sir, I did.

* * * * *

Q. (By Mr. Siegel) Mr. Albrecht, I will show you what has been marked Plaintiff's Exhibit 12, and ask

you if you will identify that document. A. Yes, sir. That is the contract that Mr. Schwarzenbach and I had signed in the agreement of selling him the route 99.

Q. Does your signature appear on that contract? A. It does.

Q. Can you identify the other signature as being Mr. Schwarzenbach's? A. Yes, sir.

Q. What is the date of that agreement? A. September 25th, 1964.

Mr. Siegel: I will ask that Plaintiff's Exhibit 12 be received in evidence, Your Honor.

The Court: Do you have any additional objections?

Mr. Hocker: Nothing further.

The Court: It may be received.

* * * * *

Q. (By Mr. Siegel) Mr. Albrecht, did other carriers delivering the Glott-Democrat newspaper also have news dealers, drug stores, grocery stores, boxes, and racks within their territories? A. Yes, sir.

Q. Do such other carriers nevertheless have what is called in the carrier business an exclusive route? A. Yes, sir.

Mr. Hocker: Wait just a second. This calls for a conclusion. This calls, first, for matter of his own knowledge. We don't know the source of it. Maybe it is a contract, maybe there is some private understanding, Your Honor. It calls for a conclusion and I object to it.

The Court: Read the question, Miss Wood.

(Question read by the reporter, as follows: Q. "Do such other carriers nevertheless have what is called in the carrier business an exclusive route?")

Mr. Hocker: That calls for a conclusion of law, Your Honor.

Mr. Siegel: I don't think it does.

Mr. Hocker: It calls for a conclusion of fact and a conclusion of law.

The Court: I will sustain the objection.

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Q. (By Mr. Siegel) Will you state what change, if any, there has been in the number of customers that you have had on route 99, from 1962 to May 20th, 1964. A. Very few. The variation would be during the summer months and vacation time. The number would drop there because there are a lot of customers that took summer vacations and they are gone for different periods of time. Some went for two weeks, some a month, and during vacation time it does drop.

Q. What is the range in numbers of the customers that you had during that period of time? A. From the upper eleven hundred to twelve hundred.

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Cross-Examination, by Mr. Hocker.

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Q. (By Mr. Hocker) Now I will show you what has been marked Defendant's Exhibit C-1 and C-2, two pages, and ask you if that was not an enclosure in the copy of the letter of Mr. Bauman to Mr. Halls, which was sent to you, Mr. Albrecht, on May 16th, 1961? A. Yes, sir.

Q. Did you read Mr. Bauman's letter when you got it? A. Yes, sir.

Q. Did you read the enclosure? A. I suppose I did.

Q. I direct your attention to the following statement in Mr. Bauman's letter, the following statements—I believe to make it clear I will read the whole first page, Mr. Siegel.

(Reading) "Mr. Alfred H. Halls, Business Agent, St. Louis Newspaper Carriers' Union No. 450, 706 Chestnut Street, St. Louis, 1, Missouri. Dear Mr. Halls:

"This acknowledges receipt of your letter of February 16th, 1961, advising us that the agreement between the Globe-Democrat and the Union for the carriers will be terminated May 26, 1961. It will also serve to acknowledge your letter of February 17th, 1961, inviting negotiations for a new contract and the various discussions which we have had since that time.

"As you know we have been advised by our counsel that the carriers are not employees and have an independent relationship with the newspaper. While we have no objection to continuing to deal with the carriers as a group as if it were a union as to matters which are permitted by law, we must take the position that any question of price is not such a matter and as to this we may not enter into an agreement with you. We are happy to consider your suggestions as to the needs of the carriers under current conditions from time to time and we will continue to consider these suggestions in determining our pricing policy. However, our pricing policy must be determined unilaterally by us.

"The legal point suggested is directly in issue in the suit you brought in the Federal Court and the argument of the motions now pending on the next law day may provide a judicial determination of the correctness of this position.

"You will be notified shortly what the wholesale prices to you will be. The recommended retail price has already been announced."—

Now I am about to read you the sentence which I want to call to your attention.

"It is our intention to see that service is provided to subscribers at the suggested retail price. If any of our carriers should increase the price to their readers, we will reserve the right to find means to supply subscribers at the recommended retail price."

Did this sentence come to your attention, Mr. Albrecht,

at the time you received Mr. Bauman's letter? A. Yes, sir, it did.

Q. Now with respect to the enclosure referred to—

Mr. Siegel: Did you read just the first page?

Mr. Hocker: I will read the rest of it, if you wish?

Mr. Siegel: All right.

Mr. Hocker: (Reading) "We understand that the carriers voted Monday night, May 15th, 1961, to request sanction from the International to strike against us. We would regard any such action not as a strike but as a boycott of our newspapers by a group of merchants.

"In 1959 we gave to the news dealers a statement of policy respecting the so-called ownership of areas and locations. This policy is also applicable to carriers as to their routes. A copy is enclosed for your information.

"Your members should understand, however, that if a boycott is attempted, we will regard each participating carrier as having given up his relationship with the Globe-Democrat and as having abandoned and forfeited his rights under this policy. We will feel free then to make arrangements for some other person to service the subscribers in the abandoned district without any provision for payment to the boycotting carrier.

"Also, in the event of a boycott, we will seek to recover triple our damages against the participating carriers under the State and Federal Antitrust Laws.

"If you have any further suggestions about this matter, we will be glad to discuss them with you. Very truly yours, Globe-Democrat Publishing Company. Signed G. D. Bauman, Business Manager."

Q. (By Mr. Hocker) Now with reference to the enclosure which has been marked Defendant's Exhibit C-1 and C-2, I would like to call your attention to these provisions. Again I guess I had better read it all to make it clear.

(Reading) "Globe-Democrat News Dealer Statement of Policy.

"Over the years there has been, and there will be no change in the policy of the Globe-Democrat toward its news dealers. Some of the newer dealers have expressed doubt about it, and for clarification it is defined, as follows:

"1. News dealers are merchants and not employees buying and selling for a profit the daily and Sunday Globe-Democrat in their respective territories and have the independence and ordinary business risks that status brings about. The company will deliver newspapers in bulk to the territory and from this point it is the responsibility of the news dealers to do whatever is needed to fulfill the purposes of the appointment.

"2. We are aware that news dealers frequently pay substantial amounts to the previous news dealers for their territories for arranging with the Globe-Democrat to have the privilege of selling newspapers transferred to them. We have in the past, and we will in the future, recognize this practice to the extent that it does not interfere with the publisher's right to be sure that the credit standing and efficiency of its news dealers is satisfactorily maintained, and to the extent that it does not interfere with the right of the publisher to determine for itself from time to time how it shall distribute its newspapers, either in its entire circulation area or in any territory or part of a territory.

"3. Specifically, the Globe-Democrat will not terminate an appointment or refuse to sell to an appointed news dealer and appoint another in his place, unless it shall have first determined on reasonable grounds that he is not accomplishing the results for which his appointment was made. Even in such a case, except where he fails to make prompt payment or knowingly permits sales in another news dealer's territory, the Globe-Democrat will be fore cutting off an existing news dealer and appointing

another, give the unsatisfactory news dealer a reasonable time, not exceeding sixty days, to produce a substitute to take over the territory whose credit, experience and efficiency is satisfactory to the Globe-Democrat. In case of a news dealer's death, the same privilege will be accorded his widow or the person he shall have designated in his will to have the privilege.

"4. No objection will be made to the substitutes so produced on the ground that a payment has been or will be made by the substitute to the existing news dealer or his representative provided the payment, in the light of past experience is not excessive nor so great as to impair the credit of the substitute.

"5. If a news dealer shall fail to accomplish the desired results for which his appointment was made, and if the Globe-Democrat shall be willing to assist the news dealer in lieu of terminating his appointment, the Globe-Democrat may, for such period as it shall determine, make an arrangement with the news dealer to provide him with such assistance as may be reasonably necessary, but for his account, in the amount of the costs thereof.

"6. The right of each news dealer whose appointment is effective to sell the St. Louis Globe-Democrat in his territory, will be maintained exclusively to him"—the word exclusively is in capitals—"as to single copy street sales so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher for the City or County in which such territory is located.

"7. Nothing in this policy, however, is to be construed as recognizing as against the Globe-Democrat a property right in the sale of its newspapers in the territory for which a news dealer is appointed, and if in the future changing business conditions should in its opinion so require, the right of Globe-Democrat is expressly reserved without any liability to terminate or to make changes in the method of distribution of its newspapers and to abol-

ish or to limit from time to time any of the territories in which news dealer distribution is made. Globe-Democrat Publishing Company. Signed by Richard H. Amberg, countersigned Walter I. Evans, Circulation Director."

Is this clause that I read to you, "The right of each news dealer whose appointment is effective to sell the St. Louis Globe-Democrat in his territory, will be maintained exclusively to him as to single copy street sales so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher for the City or County in which such territory is located." Did that clause come to your attention? A. It came to my attention. That is their statement, Mr. Hocker.

Mr. Siegel: Just answer the question. A. Okay.

Q. (By Mr. Hocker) Now after receiving this letter following the termination of the contract, did you, or did anyone in your behalf, write to the Globe-Democrat? A. I didn't.

Q. You didn't? A. I didn't.

Q. The question is did anyone, to your knowledge, write in your behalf? A. I am not sure; no, sir.

Q. Did you continue to operate after the termination—when the contract terminated do you remember June 26th, or May 26th, wasn't it, 1961? A. I believe you have the record of it there in that letter.

Q. That would be ten days after this letter was sent to you, is that right? A. It is possible that is the date.

Q. After ten days expired, the contract was no longer in effect and did you continue to act as the carrier for the Globe-Democrat on route 99? A. I did.

Q. Until the date that you were called down to the office or at least when Mr. Evans told you that they were going to exercise their right under this statement of policy in May, I think it was, 1964, did you make any communi-

cation to the Globe-Democrat with respect to your right with respect to the Globe-Democrat? A. Yes, sir.

Q. When was that? A. That I was an independent merchant and that I did not think it was—

Q. The question was when was it. A. When? I don't recall the date, sir.

Q. Well— A. I think there is a letter on record to that effect.

Q. A letter on record? A. That I had received from Mr. Evans.

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Q. (By Mr. Hocker) Just before the recess, Mr. Albrecht, you said that there was some record of your statement to the Globe in a letter of Mr. Evans. I will show you Plaintiff's Exhibit 5, and ask you if that is the letter you referred to? A. Yes, sir.

Q. This is the letter that read, "Under date of June 1st, 1962, from the enclosed notices it appears that you are charging a dollar seventy cents per month for the daily Globe-Democrat in spite of our published announcement that the price is a dollar sixty cents. It is the policy of the Globe-Democrat not to deal with carriers who charge their subscribers more than the published rates, and if after this warning you persist in charging at the higher rate, we will take whatever legal steps appear to be necessary to effectuate our position." Is this the letter you referred to? A. Yes, sir.

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Q. (By Mr. Hocker) I will show you what has been marked Defendant's Exhibit D, Mr. Albrecht, and ask you if you can identify that as the restatement of the Globe-Democrat statement of policy made specifically applicable to carriers? A. Yes, sir.

Q. You did see a copy of that? A. Yes, sir.

Q. At or about the date that it bears? A. Yes, sir.

Q. That date is what? A. May 24, 1962.

Q. I wish to call your attention to two portions of that exhibit, paragraph 3, reading as follows: "The Globe-Democrat will not terminate an appointment or refuse to sell newspapers to an appointed carrier or appoint another in his place unless it shall have first determined on reasonable grounds that he is not accomplishing the results for which his appointment was made. In cases where a replacement is necessary, except where he refuses to supply his territory or fails to make prompt payment or charges more than the publisher's suggested retail price or knowingly permits sales in the territory of another carrier, in which case papers may be cut off immediately. The Globe-Democrat will, before cutting off an existing carrier and appointing another, give the unsatisfactory carrier a reasonable time, not exceeding sixty days, to produce a replacement to take over the territory whose credit, experience and efficiency is satisfactory to the Globe-Democrat. In case of the death of a carrier, the same privilege will be accorded his widow or the person he designates as his successor if such designation shall be deposited with the Circulation Department of the Globe-Democrat prior to the death."

And paragraph 5: "The right of each carrier whose appointment is effective to sell the St. Louis Globe-Democrat by home delivery in his territory, will be maintained exclusively to him under the terms of his appointment so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher for such sales in the City or County in which such territory is located."

Did you read those two paragraphs in this Exhibit D when you got it? A. I did.

Q. Did you ever write the Globe-Democrat about that statement? A. I spoke to Mr. Evans after receiving the exhibit later that you had before.

Q. You mean after the letter of June, 1962? A. Yes, sir.

Q. Is that the one you are talking about? A. Yes, sir. Never had I agreed to that statement of policy. I had to deliver newspapers because of my investment, but never had I agreed to that statement of policy. Being an independent merchant I have the right to set my prices.

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JAMES McDOWELL

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Siegel.

Q. Will you state your name, please? A. James McDowell, M-c-D-o-w-e-l-l.

Q. Where do you live, Mr. McDowell? A. 4915 Argyle.

Q. By whom are you employed? A. Milne Circulation Sales Corporation.

Q. This is a corporation, is that correct? A. Right.

Q. Now I may refer to it hereafter sometimes as simply Milne. Where is Milne's home office? A. Birmingham, Michigan.

Q. What business is Milne engaged in? A. The procuring of readers for various papers throughout the country.

Q. Is the company's sales promotion limited only to newspapers? A. No, it depends on the area. Some areas have other accounts, other types of accounts.

Q. Do you here locally have other types of accounts? A. Yes, we do.

Q. Does the company, Milne Circulation Sales Corporation, have more than one office? A. Yes.

Q. Do you know how many offices they have? A. No, I can't give you a definite answer, but I think it is

around in the neighborhood of seventeen to twenty, somewhere in there.

Q. Do you know where some of those offices of Milne are located? The cities and states? A. Yes. Anywhere from Los Angeles to Miami, Florida, and in Canada, Montreal to Vancouver.

Q. What kind of service does Milne render to these companies that engage it? A. They serve—they procure readers for the paper.

Q. What means do you employ to achieve that objective? A. We have two means, we use telephone solicitation and we use direct sales, that is boy crews go from door to door.

Q. Does Milne have an office here in St. Louis? A. Yes, they do.

Q. What is the location of that office? A. 3915 Olive.

Q. 3915? A. 3615, pardon me.

Q. Does Milne render services such as you have just testified about in connection with sales promotion in order to obtain readers for the defendant Herald Company or Globe-Democrat? A. Yes, sir.

Q. For how long have you been employed by Milne? A. It is about seven years, six or seven years.

Q. In what capacity are you now employed, or were you employed in the year 1964? A. Area manager.

Q. For how long have you been area manager? A. Five years.

Q. Here in St. Louis? A. Here in St. Louis; yes, sir.

Q. What area does Milne's branch office here in St. Louis cover? A. Within a radius of about one hundred miles.

Q. Is the Globe-Democrat the only newspaper for whom you perform services here in this area? A. Yes, sir.

Q. On what basis, Mr. McDowell, is Milne compensated by the defendant Globe-Democrat for services rendered to it in connection with the St. Louis Globe-Democrat? A. They get paid by the order.

Q. They receive a commission on the sales or orders?
A. Yes.

Q. Of customers that you procure here? A. That is right.

Q. Now did Milne render any services to the St. Louis Globe-Democrat relating to route 99 in Kirkwood, Missouri, during the year 1964; that is the route that the plaintiff in this case, Lester Albrecht, had. A. I didn't get the first part of that, sir.

Q. Did Milne render any service to the Globe-Democrat with respect to route 99 on which Mr. Albrecht—the route Mr. Albrecht had? A. Yes.

Q. That was during the year 1964? A. Yes.

Q. By whom were you first contacted in that connection? A. Mr. Evans.

Q. When were you first contacted by him? A. I honestly don't remember the exact date. It was about a year ago now, it would seem to me. I don't know the exact date.

Q. Some time around May of 1964? A. Right.

Q. Now when Mr. Evans contacted you did he call you by telephone? A. No, I was in the office, in the main office. I go there every morning.

Q. You go there when? A. Every morning.

Q. Every morning? On this first occasion when he spoke to you about Mr. Albrecht's route, what did he say and what did you say?

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A. It seems to me—I am trying to recall. He called me into the office and asked me to get a group of boys together but that was just in conversation, for solicitation purposes.

Q. (By Mr. Siegel) This is the first time you spoke to him about it? A. Yes.

Q. Did you have any conversation with him about telephone solicitors or telephone solicitation? A. Not at that

particular moment. I don't recall that at that first meeting. That is what you are interested in.

Q. Yes. A. I don't recall.

Q. Well tell me, state just what was said. A. Well, he just asked me to get a group of boys together and this I went about my business to secure for him.

Q. Did he state for what reason or purpose you were to get a group of boys together? A. Not at that moment; no, he didn't.

Q. Did you ever have a conversation with Mr. Evans about telephone solicitation of residents within Mr. Albrecht's route 99 in Kirkwood? A. I don't remember directly, sir. We secure—the way we telephone solicit is by reverse directory and it is cut up into routes, carrier route order.

Q. Did you do any telephone solicitation for the Globe by use of the reverse directory? A. Yes.

Q. Did you do that in the year 1964? A. Yes.

Q. Did Mr. Evans ask you to do that? A. I don't think he did directly, no, sir.

Q. What do you mean "directly"? A. Well, I believe if I recall it, Mr. Evans, who is the promotion manager of the Globe, brought the cards up to our office and handed them to us to work.

Q. What did you do with the cards? A. We distributed them among three different people.

Q. What did these three different—what people were these you are talking about? A. They are three solicitors for us. Do you want their names.

Q. Yes. A. There was a chap named Jim England, Art Kimball, and another chap named Stan Martin.

Q. What was on these cards that were furnished to you by the Globe-Democrat? A. A complete list of the houses, the names of people, the houses on each street in that area.

Q. Would that be within this route 99? A. It would be.

Q. Now what did these three telephone solicitors do with those cards? A. They just started to telephone people.

Q. Did you give them any instructions as to what they should say? A. Verbally we did, yes. We told them to call and check the service in the area.

Q. Call and check the service? A. Yes, we do that as a general practice.

Q. Did Mr. Evans ever give you any instructions as to what you were to say to the people that were to be solicited by telephone? A. I can't honestly say that he did. You see we get our instructions sometimes second-hand from the promotion manager, and I can't recall whether it was Mr. Evans or Mr. Ernst, but we were told to find out if people were unhappy, let's say, with the charges they were paying.

Q. With the extra charges that who was paying? A. The subscribers. Any subscribers we might run into when we telephoned.

Q. Did Mr. Evans tell you that any of these people on these cards were paying prices in excess of the suggested retail price? A. I am not sure whether it was Mr. Evans or Mr. Ernst.

Q. Did one or the other? A. Yes. As I say, our instructions came from the office.

Q. The office of the Globe-Democrat? A. Yes. Undoubtedly there was somebody instructed us.

Q. What were the instructions, Mr. McDowell? A. They asked me to call, and I recall that we were not to offer any special inducement such as we do on the regular telephone solicitation. We were to call and find out how the service was in the area, if they were happy with it. If there was anything amiss then we were to assure them that they could have the paper delivered, if it was a question of increased price, if they were paying more than the published price or had been paying more than the published price, we were to suggest that we could assure them delivery at the established published price of the paper which was a dollar sixty cents and twenty cents per week.

Q. Do you normally solicit people who are already subscribers, Mr. McDowell? A. Yes, we do.

Q. In what way does that come about? A. Well, we just take the reverse directory and call house after house. We don't know which are subscribers and which are not. We find out very quickly on our opening statement. That is why we ask in order to get away from the subscriber and not irritate them too much, we ask them how the service is.

Q. Then you break off the conversation, do you? A. Thank them for taking the trouble, yes, sir.

Q. Is that what you did with respect to the cards that were furnished you by the Globe-Democrat? A. The same procedure. Only if we found out they were unhappy paying the extra price, we suggested they could get the paper at the regular price, the record prices we call it in our office, that is the published price.

Q. Is that a departure from your normal procedure, to advise the person on the other end of the telephone that if they are paying more than the defendant's suggested retail price you will see to it that the newspaper is delivered to them at the suggested retail price? A. I would say yes, sir.

Q. Had you ever done that before during the entire period of time that you have been handling telephone solicitation for the Globe-Democrat in the last, whatever it was, four or five years? A. No, sir.

Q. As a matter of fact, did Mr. Evans give you any instructions as to what your telephone solicitors were to say if they learned that the persons whose names and phone numbers they supplied you with were being charged more than the suggested retail price? A. Yes. I will say Mr. Evans or Mr. Ernst; I don't know which it was.

Q. Did you instruct your solicitors to inquire as to what price Mr. Albrecht was charging these people that were contacted by phone? A. Yes, sir.

Q. Did you do any of the telephone soliciting yourself?

A. No, sir.

Q. Or the door-to-door soliciting? A. No, sir.

Q. What was the source of your knowledge as to what these telephone solicitors would say? A. We have a monitor system in our office over which we can listen to every conversation that is going on.

Q. Did you do that yourself? A. Yes.

Q. Yourself? A. Yes, sir.

Q. Did you do that on more than one occasion? A. Yes, sir.

Q. Can you estimate how many times you listened over the monitor? A. Yes, sir.

Q. Was it a great many times? A. I would say so. Sufficient, anyway, to know—to get the general—

Mr. Hocker: Please keep your voice up, Mr. McDowell, so that everybody on the jury can hear you. A. I am sorry.

Q. (By Mr. Siegel) On the basis of what you heard over the monitor that you had in your office, would you be able to hear the conversation between the subscriber or on the part of the subscriber and your solicitor? A. Yes.

Q. On the basis of what you thus heard, would you state what your telephone solicitors would say to the person called in this connection on Mr. Albrecht's route?

A. Well, if they intimated they were not taking the paper, we would go ahead and try to solicit them to take the paper on a trial offer of thirteen weeks, our usual procedure. Here again we didn't offer them anything special.

Q. Um hum. A. If they were unhappy, some of them had stopped the paper—we ran into this—on account of the extra charge, service charge, as they called it. We managed to get some of those, but I can't remember the exact amount, but we did get some of those back under this new system of delivery at the published price.

Q. What about the persons who said they were receiv-

ing the Globe-Democrat newspaper and were having it delivered by Mr. Albrecht? A. We asked them if they were happy with his service.

Q. Did you ask them if they were paying over the suggested retail price? A. Yes, we did.

Q. And if they said they were paying above the suggested retail price or defendant's suggested retail price, would you tell them what the regular price was? A. Sometimes we had to ask them to look at their last bill and tell us how much they paid.

Q. Would you suggest to them what the defendant's suggested retail price was? A. Yes.

Q. If they said they were paying more than the regular price, what would the telephone solicitor say to them? A. Assure them that they could have it delivered at the regular price.

Q. Which was what? A. A dollar sixty cents for the daily, and twenty cents for the weekend.

Q. Did your telephone solicitor say who it was that would make such deliveries to the subscriber at the publisher's suggested retail price? A. No, they did not.

Q. When a telephone solicitor spoke to a person who indicated that Mr. Albrecht had been charging him more than the defendant's suggested retail price but wanted the newspaper delivered at the defendant's suggested retail price, what would your telephone solicitor do? A. We have an order form. They just filled out the regular order form we used for any new business. This is made up in triplicate. We just completed that form and took it down to the Globe-Democrat.

Q. Who would you give it to at the Globe-Democrat? A. To the person at the Circulation Desk.

Q. Were all the names and addresses that your solicitors called, these residents within route 99, supplied to you by the Globe? A. Yes, sir.

Q. Do you know how many persons Milne contacted by

telephone in connection with Albrecht's route? A. I haven't got a clue.

Q. Pardon me? A. I haven't got a clue. I have no idea.

Q. Do you know how many names and addresses of persons who had been having the Globe-Democrat newspapers delivered to them by Albrecht you were successful in obtaining for the Globe-Democrat? A. I think between two hundred fifty and two seventy-five, somewhere around that; I am not quite sure.

Q. For how long did these persons solicit by telephone?

A. Well, we operate thirteen hours a day.

Q. For how many days did they continue to solicit the residents within Mr. Albrecht's route? A. It seems to me we were on it for about two weeks.

Q. Did they cover all of the persons who had telephones within that route? A. Right.

Q. Now did you use any other, or did Milne use any other method of solicitation to attempt to persuade subscribers to switch from Albrecht to have delivery of the Globe made by the Globe at the suggested retail price?

A. No, sir.

Q. You used no other method of solicitation? A. No, sir.

Q. I thought you had mentioned some door-to-door solicitation. A. We didn't have anything to do with that, sir.

Q. You didn't have anything to do with it? A. All I did was hire the boys for Mr. Evans.

Q. You hired them for Mr. Evans? A. Yes, I did.

Q. Did he ask you to hire them? A. Yes, sir.

Q. Who paid for these boys? A. We paid the boys.

Q. Then they were employed by Milne Circulation, is that right? A. Yes, sir.

Q. How were they paid, on what basis? A. I think it was a dollar and a quarter an hour we paid them.

Q. Is that the basis on which your employees are paid

for soliciting? A. No. No. They are commissioned people.

Q. But in this particular case they were paid—

A. No. No. I of course don't know—there was no definite date as to how long they were going to work; but anybody we take on we always put them on the minimum guaranteed basis on that scale of a dollar and a quarter while they are learning, while they are training to become a sales person.

Q. Did the Globe-Democrat reimburse Milne for the hourly wages the boys Milne hired were paid? A. Yes.

Q. Those are the boys who solicited from door-to-door?

A. Yes. There were only three.

Q. How many people were there during this time?

A. Three.

Q. Did the door-to-door solicitation take place after the telephone solicitation? A. Yes, it did.

Q. Will you state what did Mr. Evans say to you with respect to requesting the door-to-door solicitation? A. I don't really recall, he just asked me to get some boys together. This was a common request because we often obtained boy crews for Mr. Evans.

Q. Did you ever—do you know how many people were solicited from door-to-door by these solicitors employed by your company? A. No, I don't.

Q. Did they solicit all of the residents that they could within Mr. Albrecht's territory? A. This I don't know, sir.

Q. Did you ever make any report to Mr. Evans as to how many subscribers they had been able to retain or to persuade to switch from Mr. Albrecht direct to the Globe? A. No, sir.

Mr. Siegel: I have no further questions, Your Honor.

Mr. Hocker: No questions, Your Honor. You may step down, Mr. McDowell. Thank you.

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GEORGE JOHN KRONER

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination, by Mr. Siegel.

Q. Will you state your name, sir? A. George John Kroner.

Q. Where do you live, Mr. Kroner? A. 9921 Mitchell Place, St. Ann, Missouri.

Q. What is your occupation? A. Newspaper carrier.

Q. How long have you been a newspaper carrier? A. Since May 1, 1964.

Q. Will you speak a little louder, I can't hear you. A. May 1st, 1964.

Q. Was that the first time you became a carrier? A. Yes, sir.

Q. For whom, or what newspapers do you carry and deliver? A. St. Louis Globe-Democrat.

Q. What is the number of routes on which you have carried and delivered newspapers? A. Route 48, and at one time route 198.

Q. Is route 48 the route that you first became a carrier for? A. Yes, sir.

Q. Is that the route still being serviced by you? A. Yes, sir.

Q. The other route you mentioned was route what number? A. 198.

Mr. Siegel: I think we have agreed that it may be stipulated that route 198 is another number that is given to indicate the customers within route 99 that were turned over to Mr. Kroner by the Globe-Democrat.

Mr. Hocker: I think that is right.

Q. (By Mr. Siegel) Now where is route 48? A. In North Webster and part of Glendale.

Q. And route 198? A. The northeast segment of Kirkwood.

Q. From whom did you acquire route 48? A. Enloe Kanheide, E-n-l-o-e K-a-n-h-e-i-d-e.

Q. From whom did you acquire route 198? A. St. Louis Globe-Democrat.

Q. Were those both acquired on May 1st, 1964? A. No, sir.

Q. Was one of them? A. Route 48.

Q. Did you pay anything for the acquisition of route 48? A. Yes.

Q. To whom did you make that payment? A. Enloe Kanheide.

Q. Did you purchase from him the list of customers, their names and addresses? A. Yes.

Q. Have you been the exclusive carrier within route 48 since that time? A. The only carrier; yes.

Q. Is there anyone else that delivers newspapers within route 48? A. Yes. Joe Schumacher, the distributor on the corner of Lockwood and Gore, he goes in some of the apartments where he has gone for years and delivered papers to people he has known for years.

Mr. Siegel: Is the jury able to hear? Can you hear Mr. Kroner all right? I wasn't certain. Thank you.

Q. (By Mr. Siegel) Where were the subscribers within route 198 located? Were they all together or separated, or how were they distributed within that route that you were servicing as 198? A. Well, they certainly are not all together. Kirkwood is a big city and they cover the whole northeast section of it, from Manchester over to Argonne and Dixon to Geyer.

Q. Now from whom did you—I believe you testified you acquired route 198 from the St. Louis Globe-Democrat. Did you pay them anything for that? A. No, sir.

Q. Those customers were turned over to you free of charge? A. Right.

Q. How many customers did you have on route 198? A. The day I started it was three hundred fourteen dailies and two hundred sixty weekends.

Q. Do you know whether or not those three hundred-odd customers, whose names and addresses were given to you by the Globe-Democrat were customers that were previously serviced and to whom deliveries were made by another carrier? A. I didn't know that of my own knowledge, no.

Q. Pardon me? A. I did not know that of my own knowledge, no.

Q. Did you learn that? A. Yes.

Q. From whom did you learn that? A. Mr. Boyd. I believe it is Mr. Vernon Boyd.

Q. Mr. Boyd is with the Globe-Democrat, is he? A. Yes, sir.

Q. Do you know his title? A. No, I don't.

Q. Do you know is he the home delivery manager? A. I said I do not know his title.

Q. All right. Did you ever have any conversations with any officer or employee of the Globe with respect to the reason these three hundred-odd customers were given to you by the Globe-Democrat? A. The only person I spoke to—I spoke to Mr. Boyd and Mr. Cleaver about the customers when I answered the ad. I talked to Mr. Cleaver.

Q. What conversation did you have with Mr. Boyd of the Globe? A. I didn't have a lengthy conversation with Mr. Boyd. He explained to me that he was serving these customers because Mr. Albrecht was overcharging them.

Q. All right. About when did he tell you that? A. Some time in July.

Q. Did you enter into any written agreement or understanding with the Globe-Democrat with respect to these

three hundred-odd customers on route 198, Mr. Kroner?

A. No, sir.

Q. Did you have any verbal understanding with them?

A. Yes.

Q. What was that? A. That I was to handle that the same as I did route 48. I was to pay my bills weekly and bill the customers according to the prescribed rate.

Q. Who told you what the prescribed rate was? A. At that time they didn't tell me again. Mr. Cleaver had told me before.

Q. Well, what did he tell you the prescribed rate is?

A. A dollar sixty cents a month for the daily papers and twenty cents a copy for the weekend.

Q. Did—— A. (Continuing) Ten cents a week for the insurance.

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Q. (By Mr. Siegel) If Mr. Cleaver did tell you anything about the suggested price, will you state what he did tell you with respect to the price that should be charged within route 198?

Mr. Hocker: Well—Go ahead.

A. I don't know that he specifically stated what to charge on 198. He said I would have to follow the prescribed rate.

Q. (By Mr. Siegel) I didn't hear you. A. I don't know that everytime I talked to Cleaver he told me what the rate would be. I was pretty well aware of it, and that is what I was to charge.

Q. At the time that you acquired route 48, did Mr. Cleaver have any discussion with you about the price you were to charge? A. Yes.

Q. What did he say? A. The rate was one dollar sixty cents a month for the daily paper and twenty cents for the weekend paper, and ten cents for insurance for those that have it.

Q. Did he indicate in any way what the policy or position of the Globe-Democrat is with respect to the price?

A. Yes. He told me the Globe-Democrat would not tolerate overcharges.

Q. The Globe-Democrat would not tolerate—— A. Would not tolerate overcharging the customers.

Q. Overcharging the customers? A. Yes, sir.

Q. Now, how did you first come to speak to Mr. Cleaver about route 198? A. There was an ad in the newspaper for a route open with three hundred-some customers without cost.

Q. Do you recall the date that you saw the ad? A. It was in a couple of days, July 2nd and 3rd, I believe it was.

Q. July 2nd and 3rd? That is 1964? A. Yes.

Mr. Siegel: Will you mark this Plaintiff's Exhibit 20 and this 21.

(Thereupon, two pages from newspapers were marked by the reporter for identification as Plaintiff's Exhibits 20 and 21 respectively.)

Mr. Siegel: You have seen these, haven't you?

Mr. Hocker: Yes, that is from the Globe, is it? What is the number?

Mr. Siegel: 20 and 21. It is July 3rd, 1964. That ad is Plaintiff's Exhibit 20 and the July 2nd ad, 1964, is Plaintiff's Exhibit No. 21.

Q. (By Mr. Siegel) Mr. Kroner, I will hand you what has been marked as Plaintiff's Exhibits 20 and 21, and ask you if you can identify those? Were those the ads that you saw in the Globe-Democrat? A. Yes, they look like it.

Mr. Siegel: I would like to ask that Plaintiff's Exhibits 20 and 21 be received in evidence.

The Court: Any objection?

Mr. Hocker: No objection.

The Court: They may be received.

Q. (By Mr. Siegel) Now did you respond to the Globe-Democrat ad or Plaintiff's Exhibits 20 and 21? A. Yes, I did.

Q. Did you speak to anyone at the Globe-Democrat? A. Yes.

Q. Who was that you spoke to? A. Mr. Charles Cleaver.

Q. What did Mr. Cleaver say to you? A. He said a lot of things. What reference do you have, what did he say to me? I can't remember the entire conversation.

Q. With respect to route 198. A. He told me where it was and it would be understood if I took it I would have to carry on as I did on my other route at the present rate, pay for my papers each week, as I was doing. He told me where it was and what the area was.

Q. Did he tell you how long you would service those customers? A. There was no time period set because it was understood that should Mr. Albrecht sell the route I may have to give the customers up.

Q. That what? A. If Mr. Albrecht sold his route I may have to give up these customers.

Q. Was any other possibility discussed with you if he did not sell the route? A. I asked the question because I was interested in another phase of it that should they get straightened up with Mr. Albrecht what would happen, and I was informed they may give them back to him.

Q. Was there any understanding reached as to if they didn't straighten up or if the Globe-Democrat did straighten up with Mr. Albrecht what would they do with the customers that the Globe gave to you? A. I would have to give them back.

Q. Back to whom? A. I would have to give them back to the Globe because that is where I got them.

Q. Back to the Globe? A. Yes. I didn't get them from anyone but the Globe.

Q. Did they say back to the Globe, or back to Mr. Albrecht? A. I don't recall just what was said because it wasn't that—I couldn't see—I didn't memorize the conversation. It was just I would have to give them up, that is what it amounted to; whoever would get them, I don't know.

Q. You would have to give them up if the Globe-Democrat got straightened out with Mr. Albrecht? A. I think the wording was the other way, if Mr. Albrecht got straightened out with the Globe-Democrat.

Q. I see. Did Mr. Cleaver make any further statement as to clarify what he meant by getting straightened out? A. No. I was pretty much aware of what the situation was.

Q. And what was the situation? A. As far as I am concerned, it is all hearsay, but it was quite prevalent.

Mr. Hocker: I will object to the hearsay, Your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Siegel) Did you know, or had you been told by anyone at the Globe—

Mr. Hocker: I object to that question.

Mr. Siegel: I will withdraw it and rephrase it.

Q. (By Mr. Siegel) Had you been told by anyone at the Globe what the dispute was with Mr. Albrecht? A. Yes, sir.

Q. Who at the Globe told you? A. Mr. Boyd.

Q. What did he tell you the dispute was about? A. Overcharging.

Q. Now after that period of time, or after you met with Mr. Cleaver—do you recall what date that was?

A. It was on Monday or Tuesday following the placing

of the ad. I don't recall just what day it was; it was the 6th or 7th.

Q. Now that would have been July 6th, or Tuesday, July 7th? It was either of those two days? A. On one of those two days.

Q. Now did you reach any understanding with Mr. Cleaver as to when you would begin delivering the Globe-Democrat newspaper to the three hundred-odd customers within that route that was designated as 198? A. I was to start learning the route by taking a few customers each day until such time as I felt I could handle it.

Q. When did you start doing that? A. In the middle of July.

Q. Who was it that was helping you learn the route? A. I learned it on my own. They just gave me a list in a certain section, Mr. Boyd gave me the people or a list in a certain section. I took those for a couple of days, then took another portion and kept adding to them.

Q. Mr. Boyd assisted you with that? A. He didn't assist me, he just gave me the list.

Q. Did you bill any of those customers for any of the deliveries that you made in July? A. I did not bill in July; no, sir.

Q. When did you start billing those customers? A. At the end of August.

Q. Now did you receive any compensation for the deliveries that you did make from the middle of July to the end of July? A. I received compensation from the Globe.

Q. The Globe compensated you? A. Yes.

Q. How were you compensated? A. By two cash payments totaling forty dollars, and some discounts on my billing.

Q. I see. Mr. Kroner, did you ever make any announcement to the customers within route 198 that you would be their new carrier? A. On August 1st I delivered a mimeographed notice to each one with the paper.

Q. You inserted that in the paper? A. Yes.

Q. You were authorized to do that by the Globe? A. Yes, sir.

Q. By whom at the Globe, who authorized you to do that? A. Mr. Cleaver.

Q. Mr. Cleaver? A. Yes.

Q. What price did you charge the customers within route 198 from the time that you took it over and began billing as of August 1, 1964, for delivery of the daily and weekend Globe-Democrat newspapers? A. At the regular subscriber's rate, a dollar sixty cents a month for the daily paper, and if they got a weekend paper, it was twenty cents per copy and insurance is ten cents a week. There are some customers there on a half rate basis, they will be billed half the price and the Globe will replace the other half. It still amounts to the same, one dollar sixty.

Q. Did you receive start orders from the Globe-Democrat Publishing Company within route 198? A. Yes, sir.

Q. Did you solicit any persons to become your customers within route 198? A. No, sir.

Q. So the only customers you had within route 198 were those that were turned over to you by the Globe-Democrat and those for whom you received start orders from the Globe-Democrat, is that correct? A. That is right.

Q. Do you know how many customers you were delivering to as of October 20th, 1964, which I believe is the date your deposition was taken? A. I don't have any exact record here. I have the one for the beginning and the end, so it would be somewhere in between.

Q. I will ask you this, or if you can answer that—
A. I wouldn't have that here exactly. It seems it was around three thirty, or somewhere in that area.

Q. Pardon me? A. Around three hundred thirty, I would think. Just an estimate.

Q. How many were daily—were those daily? A. Yes.

Q. About how many Sunday or weekends? A. That would be around two hundred eighty-five or two hundred ninety.

Q. How did your delivery to subscribers on route 198 terminate, and when? A. I sold the route to Mr. Eugene Schwarzenbach.

Q. Eugene Schwarzenbach? A. Yes.

Q. When did you sell it to him? A. As of December 1st, 1964.

Q. Did he pay you for those customers that you sold to him? A. Yes, he did.

Q. What was the date you sold him? A. December 1st.

Q. Do you know how many customers there were at that time? A. Three hundred sixty-four daily and three hundred thirty-six weekend.

Q. How much did Mr. Schwarzenbach pay you for those customers, Mr. Kroner?

Mr. Hocker: I object to that as irrelevant, Your Honor.

The Court: Overruled.

A. Thirty-six hundred dollars.

Q. (By Mr. Siegel) Thirty-six hundred dollars? A. Um hum.

Mr. Siegel: No further questions.

Mr. Hocker: Thank you, Mr. Kroner. No questions.

The Witness: Thank you.

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Mr. Siegel: I would first like to read certain questions from Interrogatories that were propounded to defendant, The Herald Company, a Corporation, doing business as Globe-Democrat Publishing Company, and then to read the answers to the Interrogatories.

Interrogatory No. 1. State whether defendant leased equipment from, and whether defendant used the services of the Associated Press in the year 1964; and if so, what

kind of information was obtained and to whom was such information disseminated.

Answer to Interrogatory No. 1. Yes. News to its readers.

Interrogatory No. 4. State whether defendant's newspaper, the St. Louis Globe-Democrat, during the year 1964 carried national advertising for persons, firms or corporations located outside the State of Missouri.

The answer to No. 4 is "Yes".

Interrogatory No. 9. State the names of cities and states in which defendant's newspaper, The St. Louis Globe-Democrat, is delivered to subscribers by newspaper carriers, such as plaintiff.

The answer to 9 is: Missouri, Illinois, City of St. Louis City and St. Louis County, St. Clair County and Madison County.

Interrogatory No. 14. State whether during the month of May or June, 1964, defendant employed or contracted with any person, firm or corporation to solicit residents within plaintiff's territory, route 99, to see if they would be interested in having the paper delivered to them at the defendant's suggested retail price by a method of delivery—by a method other than delivery by the plaintiff.

The answer to Interrogatory No. 14 is "Yes".

Interrogatory No. 15. If the answer to the preceding interrogatory is in the affirmative, state (a) the name and address of the person, firm or corporation that was so employed or engaged by contract by defendant to perform the foregoing service.

The answer to 15 (a) is Milne Sales Company, 3615 Olive Street, St. Louis, Missouri.

15 (b) The instructions given to said person, firm or corporation with respect to what should be said to residents in plaintiff's territory, route 99.

(b) The answer: There were no written instructions. See testimony of Walter Evans and James McDowell taken by plaintiff.

Those are all the interrogatories.

I would now like to read certain admissions by defendant contained in the deposition of Walter I. Evans, the Circulation Director of defendant, starting on page 2.

Q. Will you state your name, please? A. Walter I. Evans.

Q. For how long have you been employed by the Globe-Democrat? A. About nine and a half years.

Q. In what capacity? A. Circulation Director.

Page 3:

Back on the record. We can stipulate, is it agreeable, then, Mr. Hocker, that we can stipulate that hereafter when I refer to the Globe-Democrat Publishing Company, the Missouri Corporation that was in existence prior to December, 1963, and The Herald Company, that I will refer to them collectively as the publisher.

Mr. Hocker: Yes, we can stipulate that whenever you use the word publisher in reference to the St. Louis-Globe-Democrat, you refer either to The Herald Company or to the former Globe-Democrat Publishing Company, or to both, as the context may indicate, or as the chronology may require. There will be no point made about which corporation is referred to when you use the expression publisher.

Q. Now Mr. Evans, in what way or manner has the Globe-Democrat newspaper been distributed by the publisher? A. Well, in many ways. It has been distributed to individual subscribers throughout the Greater St. Louis Area by carriers, a term we use as carriers. It has been distributed for single copy sale in many various ways through dealers, single copy sales at retail outlets, including storage racks, stands, etc. And throughout the two-state area, more or less the same pattern is followed.

There are two main methods of distribution: home delivery and individual retail sales, plus mail distribution in those areas where we do not have dealer or carrier distribution.

Q. When you refer to the "the two-state area," what states did you have reference to? A. Missouri and Illinois.

Q. Now with respect to the carrier system that you mentioned, how long has this method of distribution been used by the publisher to your knowledge? A. Forever.

Q. Pardon me? A. Forever.

Q. In any event, for a long time, even prior to the time that you came here? A. Oh, yes.

Q. Now what area is covered by the carrier system? A. St. Louis, most of St. Louis County, portions of Madison and St. Clair Counties in Illinois.

Q. And how, perhaps in some more detail, does this carrier system operate? A. The carriers are independent merchants who buy the number of papers they need from us for distribution to all their subscribers. They buy the papers at a wholesale price and earn their living by selling it at a retail price.

Q. Their subscribers are whom? What people are their subscribers? Are these people who live in individual homes who have the Globe-Democrat newspaper delivered to their homes? A. Yes. Or apartment.

Q. Or other business or apartments? A. Yes, that is right.

Q. Now, how is this area in which the carriers work divided, if it is divided? A. It is divided by so-called routes.

Q. How many routes does the publisher have? A. At present I think we have about one hundred sixty-five carrier routes. I don't know if you would say the publisher has. They are in existence. We don't have these routes. There are in existence about one hundred sixty-five routes.

Q. Do you know for how long these routes have been in existence? A. Some of them have been in existence as long as the carrier system has been in effect. Others have been recently created.

Q. —Then there was interposed another question or

answer, then the answer: A. To answer your question more accurately, as of June we had one hundred seventy-two routes.

Q. The publisher does not employ employees to deliver the Globe-Democrat to customers on those routes, does it?

A. No.

Q. It uses the carriers, the independent merchants to deliver the newspapers to home subscribers, does it not?

A. The terminology, it uses carriers to deliver it, yes. The carriers deliver it, yes.

Q. And the publisher is not in the carrier business, that is, the business of delivering papers, the Globe-Democrat newspapers to home subscribers, is it? A. No.

Mr. Hocker: You mean within the one hundred and seventy-three routes.

Mr. Siegel: Yes, within the one hundred seventy-two or seventy-three routes.

The Witness: No.

Q. How do these individual carriers acquire the newspaper routes? What is the procedure by which they acquire newspaper routes? A. Generally they are purchased from one party to another.

Q. They don't purchase the route from the publisher, do they? A. No, sir, we have no routes.

Q. They don't pay anything to the publisher for the customers on these routes, either, do they? A. No.

Q. So that the carrier who was starting in the carrier business, he would purchase the route and the list of customers from the previous carrier, is that correct, who was servicing that route? A. Yes.

Then on page 11:

Q. Mr. Evans, you mentioned that there were as of, I think last June now, whatever that month was, in this year, some one hundred seventy-two routes. Now I would like to ask you on how many routes did the publisher

engage in the carrier business of selling and delivering Globe-Democrat newspapers for home delivery in the year 1956? A. None.

Q. The same question for the year 1957. A. The same answer.

Q. 1958? A. Same answer.

Q. 1959? A. Same answer.

Q. 1960? A. Same answer.

Q. 1961? A. Same answer.

Q. 1962? A. Same answer.

Q. 1963? A. Same answer.

Q. 1964? A. Now would you rephrase your question?

Q. Now I will ask you that with respect to 1964, on how many routes did the publisher engage in the carrier business of selling and delivering Globe-Democrat newspapers for home delivery in the year 1964?

Mr. Hocker: Now wait. I don't want to quarrel with your wording, but when you say "the carrier business," you mean as he described it in his previous testimony, I take it.

Mr. Siegel: All right. By "the carrier business," I mean the business of selling and delivering Globe-Democrat newspapers for home delivery.

Mr. Hocker: All right, go ahead and answer, Walter.

A. One.

Q. (By Mr. Siegel) All right. Now let me ask you that same question with respect to the present time. Which was October 19th, 1964. A. None.

Q. So that during this entire period from 1956 up to the present time, there has only been one occasion on which the publisher has engaged in the business of selling and delivering Globe-Democrat newspapers for home delivery, and that occurred during the year 1964? A. Right.

Q. All right. Let me ask you: other than with respect

to the Albrecht case, do you know of any instances in which the publisher has ever condoned or approved the practice of punching, that is the practice of permitting one carrier to sell and deliver Globe-Democrat newspapers within the route of another carrier? A. No. With this exception, Mr. Siegel, there can be a mutual agreement between carriers. If it is geographically practical for one carrier to deliver a certain small area, one block of another carrier, and by mutual agreement they agree to this, that is approved. But that would hardly be called punching. Punching infers the aggressive, trying to take away business.

Q. Now with respect to Mr. Albrecht, the plaintiff in this case, did the publisher condone or approve the practice of one carrier selling and delivering newspapers within Mr. Albrecht's route? A. Yes.

Q. And then, as I understand your testimony, except for that one possible exception you mentioned with respect to punching where there was a mutual agreement between carriers permitting one to sell within another's route, do all of the carriers on these one hundred seventy-two routes, or whatever may be the number at any period of time between 1956 and the present time, are those persons the ones who had the exclusive right to deliver within their routes A. To home delivery subscribers, yes.

Q. Now what equipment do the carriers use, if you know, in order to make their newspaper deliveries? A. Whatever they choose to use.

Q. Well, as a matter of practice, what do they actually for the most part use. Vehicular equipment, or how do they deliver? A. In the main, from vehicles.

Q. From automobiles or panel trucks, or what sort of vehicle? A. Everything from a horse drawn vehicle, believe it or not, to trucks.

Q. Does the publisher own any such equipment? A. No.

Q. Such situations as Mr. Hocker described and that

you have previously mentioned, did the publisher employ any persons to deliver the Globe-Democrat newspaper on any of these newspaper routes of carriers that you have described in the year 1956?

Mr. Hocker: You mean except for the exceptions which he mentioned, the emergency situations?

Mr. Siegel: Except for these few exceptions that you have mentioned and the illustration that Mr. Hocker mentioned.

A. No.

Q. The same question for 1957? A. Same answer.

Q. 1958? A. No.

Q. '59? A. No.

Q. 1960? A. No.

Q. 1961? A. No.

Q. 1962? A. No.

Q. 1963? A. No.

Q. 1964? A. Now would you rephrase the question again?

Q. Yes. Did the publisher employ any persons to deliver the Globe-Democrat newspaper on any of these routes in the year 1964? A. Yes.

Q. Does the publisher at the present time employ any persons to deliver the Globe-Democrat newspaper on any of the newspaper carrier routes? A. No.

Q. On what route did the publisher employ persons to make delivery of the Globe-Democrat newspaper during the year 1964? A. Albrecht's.

Q. Well, just tell me all the ways and means by which the publisher has taken any steps or efforts to see to the maintenance of its suggested retail price. A. With the exception of Albrecht's we have taken no other steps except to contact carriers whose subscribers have called to our attention the fact that carriers were not charging our suggested price. And requesting them to do so with the exception of the Albrecht case.

Q. Now with respect to the Albrecht case, what steps have been taken to see to the maintenance of the publisher's suggested retail price? A. We notified Albrecht that if he did not maintain the suggested retail price we would go into business on a competitive basis offering the subscribers in his territory the opportunity to have the paper delivered to them at the retail price.

Q. Did you do anything else? A. We sent a letter to everyone whose name was available to us in the Albrecht territory, advising them that if they wanted papers delivered at the suggested retail price we would have them available for them.

Q. And this was done, too, like the other things you have mentioned, in an effort to maintain the publisher's suggested retail price? A. That is right.

Q. Can you state the date of such price changes and the amounts, please.

And over on page 31 I will read: A. April 10, 1961, the suggested retail price of the paper went to seven cents.

Q. (By Mr. Siegel) Weekend paper or the daily? A. Daily paper.

Q. That was seven cents from five cents, was it not? A. That is right.

Then on page 37:

Q. Those are the changes. All right. Now do you know—I think you have already testified—or let me ask you anyway. Do you know the plaintiff in this case, Lester Albrecht? A. Yes.

Q. For how long have you known him? A. Oh, ever since he took over.

Q. Since approximately June of 1956? A. Yes.

Q. During the time Albrecht has been a carrier for the publisher, have you or any officer or employee of the publisher ever had occasion to speak to Albrecht about the manner or method in which he was operating his business as a carrier for the St. Louis Globe-Democrat? A. No.

On page 42:

Q. All right. Let me ask you, do you recall any complaints from any customers of Albrecht's about any matters other than price? A. No.

Q. Did the publisher ever have any complaints about Albrecht's operation or the manner in which he conducted his business of performing as a carrier of the St. Louis Globe-Democrat newspaper during the period from the time he first started in June of 1956 up to the present time, other than with respect to price? A. Not to my knowledge.

Page 56:

Q. Meanwhile, I will show you what has been identified as Exhibit C, and I think we can stipulate this is the same as Plaintiff's Exhibit 18, and I will ask you, Mr. Evans, is that the card that was sent out to the residents located within route 99? A. Yes, it is.

Q. Now, how many cards did you receive back from the residents within route 99 which was Albrecht's route? A. I would have to look back over the record.

Q. Now what did you do after you received such card from—whether it was a customer of Albrecht or resident of route 99? A. We turned them over to one of our employees for delivery.

Q. And what was the name of that person to whom you turned these cards over? A. Vernon Boyd.

Mr. Hocker: I counted one hundred twenty-nine of these cards here but I may have missed a few.

Mr. Siegel: I will be willing to stipulate to your counting of the cards and let the record show that Mr. Hocker has counted the cards that Mr. Evans testified were the cards received back from the residents to whom they were sent under cover letter of May 21, 1964, and the total number of such cards is what?

Mr. Hocker: According to my count is one hundred twenty-nine; I may have missed some, I didn't take them out of the file.

Mr. Siegel: One hundred twenty-nine. I would be willing to stipulate to that number, give or take a few.

Q. Now after such a card was received, would you issue a stop order to Albrecht with respect to that particular person who sent in such a card? A. Yes.

Q. Now does this cumulative list, Exhibit 19, contain more names than the number of people who sent back cards in response to your letter of May 21? A. Yes, sir, it does.

Q. How were those additional names obtained? A. The Globe-Democrat has an agreement with an organization that does telephone promotion work. We used this organization to phone residents residing in Albrecht's territory to tell them verbally what was in Exhibit 17. That has reference to the letter of May 20th or 21st—May 20th, 1964.

Q. What is the name of this organization? A. Milne Sales.

Q. Who contacted them? A. I did.

Q. To whom did you speak? A. James McDowell.

Q. All right. Now you were telling me about the conference that you had in your office some time in May of 1964, after May 21st, with James McDowell. He is with Milne Sales? A. That is right.

Q. What did you say and what did he say at that meeting? A. I told him that I wanted him to put some people on the phone to contact residents in Albrecht's territory and express to them the facts contained in our letter, your Exhibit 17—that is the letter of May 20th—and to see if they would be interested in having the paper delivered to them at the suggested retail price by a method other than Albrecht's.

Question on page 67:

Q. Was there any other method in addition to the sending out of the card identified as Plaintiff's Exhibit 18, and this telephone solicitation, by which customers were sought by the publisher? A. Yes. The same Milne organization

had several high school boys, I believe, going out door to door with the same presentation.

Q. Did you have any further discussion with Mr. McDowell or anybody else to embark on this door to door solicitation program? A. I told him I wanted it.

Q. At the same meeting in May, or subsequent? A. It might have been subsequent. I can't do any better than this. I think this will be quite accurate, two days later. That would make it May 23rd, the Milne organization started to phone. On completion of this phoning one week went by and then a door to door solicitation was made. Now the only question of time here, Mr. Siegel, how long the phoning took. It would be my guess it probably didn't take more than about a week.

Q. Mr. Evans, did you send Albrecht stop orders for any of his customers from whom you did not receive back a card such as those identified as Plaintiff's Exhibit 18? A. Yes. We sent him stop orders when we received start orders from the Milne organization either on the telephone or door-to-door campaign.

Question on page 71:

Q. Did you speak with Mr. Boyd? A. Probably.

Q. All right. Now what position did he have with the publisher? A. His title is home delivery supervisor.

Question page 74:

Q. What equipment, if any, was used to deliver the Globe-Democrat newspaper to customers on route 99? A. Automobiles.

Q. Whose automobiles? A. Those of the men delivering them.

Q. The personal automobiles of Boyd, Dorway and James? A. Yes.

Page 79:

Q. So is it correct that Boyd, Dorway and James delivered papers to customers within route 99 during the period from May 23rd, 1964, up to some date prior to July 6th, 1964? A. Yes.

Q. Who was that person? A. Carrier 198. His last name is Kroner. I don't know what his first name is.

Question on page 81:

Q. From the time that Kroner took over or began delivering Globe newspapers to customers within route 99, is it a fact that the publisher was no longer then delivering those newspapers to customers within route 99? A. That is right.

Page 91:

Q. Mr. Evans, was there any reason other than the price that Mr. Albrecht charged why the publisher undertook to deliver its newspaper itself to customers within route 99? A. I think the answer is really a quick, direct no, but I had better review the question.

(Last question read by the reporter.)

A. No.

Mr. Hocker: Incidentally, you did pick up a few new customers, I suppose, that you didn't have before?

The Witness: —Mr. Evans—We would have to by force of numbers, yes, and those who had quit him permanently before this because of this and who were happy to come back.

Mr. Hocker: This was not the purpose of this?

The Witness: Absolutely not.

Q. Mr. Evans, were the arrangements made with Boyd, Dorway and James only temporary until the publisher could find some other carrier other than Albrecht to deliver its papers within route 99? A. Yes.

Page 95:

Q. Did the publisher charge Kroner anything for the customers' names or the right to deliver papers to customers within route 99? A. No.

Page 103:

Q. Did you tell Mr. Cleaver to instruct or to tell Mr.

Kroner what price he was to charge? A. Oh, I probably told Mr. Cleaver to remind Mr. Kroner that our suggested retail price was a dollar sixty cents a month for the daily and twenty cents a weekend for the weekend.

Q. Did you have any conversation or tell Mr. Cleaver what he was to tell Mr. Kroner with respect to why these customers were being turned over to him and what practice Albrecht had been following concerning prices? A. Well, Mr. Siegel, I doubt it, because we knew perfectly well that Mr. Kroner knew all the circumstances surrounding this. It was by now fairly common knowledge, I am sure.

Page 105:

Q. What is the regular practice that is followed by the publisher when it learns of or received any request from persons residing within a route that they want to have the Globe delivered to their home? What does the publisher do? A. We send them the start order.

Q. Send who the start order? A. The carrier serving that territory.

Page 106:

Q. (By Mr. Siegel) No, I don't think so. I am talking about someone who—well, let's first start; talk about someone who unsolicited calls up and says, "I would like the Globe delivered to me," and this person is a resident of the area that comprised route 99.

Mr. Hocker: And when did he receive this?

Mr. Siegel: After May 20th, 1964.

Mr. Hocker: And before what date?

Mr. Siegel: Anytime after May 20th, 1964.

Mr. Hocker: Well, this assumes that the practice was constant. It may be, I don't know.

A. At the time that employees of the publisher were delivering the paper, we gave them the start orders. After

Kroner took over the delivery of these papers, we gave him the start orders with the exception of those people who might have been returning from vacation who specified that they wanted the delivery of the paper resumed by Albrecht. In this case we sent him the start orders.

Q. Was that the only case in which you would send the start orders to Albrecht? A. Yes.

Page 128:

Q. Did you meet with Mr. Schwarzenbach? A. Yes.

Q. And who was present at the September 22nd, 1964, meeting? A. Mr. Schwarzenbach, Mr. Bauman and myself?

Q. And what was said at that meeting? A. We said we had checked his various statements that he had given us, that they seemed to be satisfactory and that if he were to consummate this deal we would approve of him as a carrier.

Q. Anything else said? A. The same discussion took place, more or less the same discussion took place about the three hundred-odd more or less papers being delivered by Kroner, and we told him that this, as any normal deal, would be between the two of them, that if he was interested in acquiring these papers, it was up to him to contact Mr. Kroner and again, if he did acquire them—if he didn't acquire them, Mr. Kroner would continue to service the subscribers in there. If he did acquire them and maintained the principles laid down in the carriers' statement of policy that he would, as long as he maintained those principles, have exclusive rights in the territory.

Q. (By Mr. Siegel) If he acquired only Albrecht's subscribers, what did you indicate to him as to whom starts would be given within route 99? A. Kroner.

Q. And only if he, Schwarzenbach, acquired the customers whom the publisher had given over to Kroner, would he, Schwarzenbach, be recognized as the exclusive

carrier for route 99. Was this stated to him? A. I believe it was stated that way, yes.

Those are all the questions I have, or admissions from Mr. Evans' deposition.

* * * * *

(Witness excused.)

Mr. Siegel: At this point, Your Honor, I would like to continue to read from further admissions by defendant, first as contained in the deposition of G. Duncan Bauman, the defendant's business manager, which were taken on October 26, or which was taken on October 26, 1964. Page 2.

Q. Will you state your name, please? A. G. D. Bauman.

Q. By whom are you employed? A. The Globe-Democrat.

Q. In what capacity? A. Business manager.

Q. For how long? A. As business manager?

Q. Have you held that position, yes. A. I think about four years.

Q. Do you render any legal services to the publisher? A. Yes.

Q. On what basis do you do that? A. I advise the publisher on labor matters and many other matters as they arise.

Q. And you are an attorney licensed to practice in the State of Missouri? A. Yes.

Q. Do you know the plaintiff, Lester Albrecht, in this case? A. Yes.

Page 4

Q. For how long have you known him? A. I think about three or four years.

Q. What kind of a reputation, if you know, does Albrecht have as a carrier for defendant, or did Albrecht have as a carrier for the defendant or publisher? A. Respecting service he had an excellent reputation, respecting price factors, he had a bad reputation.

Q. Had there been any complaint other than those having to do with his charging more than the publisher's suggested retail price about Albrecht's performance of his job as a paper carrier for the publisher? A. Yes.

Q. What were they? A. There were complaints as to pricing practices.

Q. I say, other than his charging more than the suggested retail price, publisher's suggested retail price. A. I don't know of any other than the pricing.

Q. As a matter of fact, Mr. Bauman, didn't you say at a meeting with Albrecht in this very same office that you wish other carriers performed their work as well as Albrecht? A. I did.

Page 6

Q. Didn't you say that if he would adhere to the publisher's suggested retail price, or charge no more than the publisher's suggested retail price, that you thought, one, such a contract in line with your statement of policy, or, that is the Globe-Democrat's statement of policy, could be entered into and there wouldn't be any difficulty in giving back to Albrecht the customers he had on his route before May 20th, 1964? A. I think this is the gist of what I said.

* * * * *

Q. Did you also state further that the publisher wasn't in the carrier business and didn't want to be, wanted to have the newspapers delivered by the carrier? A. I am certain that I said that.

Page 10:

Q. Has the publisher had occasion other than with respect to the plaintiff, Lester Albrecht, to implement this policy of the carriers charging no more than the suggested retail price? A. Yes, on many occasions.

Q. Can you recall any of those occasions? A. I can't recall them specifically but I recall there have been numerous complaints of over-pricing over the last four or five years and that they have all been forwarded to Mr.

Evans who contacts or has Mr. Cleaver contact the carrier and advise the carrier of our policy.

Page 13:

Q. Did you help write the letter of May 20th, 1964, to Mr. Albrecht?

Mr. Hocker: When you say write, you mean compose?

Mr. Siegel: I mean compose.

The Witness: Could I see it?

Mr. Siegel: That is Plaintiff's Exhibit——

Mr. Hocker: No, I don't think you did mark it. You identified it before as Exhibit A to the Complaint.

Mr. Siegel: That is correct. And that is what I have shown you, Mr. Bauman.

Q. Did you help compose that letter? And this is the letter of May the 20th. A. I did.

Q. Did you discuss the writing of such letter with any officer or employee of the publisher on or before May 20th, 1964? A. I did.

Q. With whom? A. Discussed it with Mr. Evans, Mr. Amberg and Mr. Hocker.

Question on page 16:

Q. Now Mr. Bauman, after these letters were sent out, the letter of May 20th and the letter marked Plaintiff's Exhibit 19 that was sent to the residents or some of the residents within route 99, together with that card marked Plaintiff's Exhibit 18, did the publisher undertake the delivery of its newspapers to customers within route 99 for the purpose of making a profit as a participant in the carrier business?

And the answer: At no time in any of our deliberations or discussions was the question of profit ever discussed.

Question on page 17:

Q. If the plaintiff in this case, Albrecht, had not charged his customers a price in excess of the publisher's

suggested retail price, would the publisher have undertaken to deliver its newspapers by itself to those customers within route 99? A. If other factors had not arisen, such as poor service, or other problems that go with the paper, and Mr. Albrecht had followed the suggested retail price, we would not then have competed with him because our statement of policy sets forth that we will reserve the right to compete only if the carrier does not observe the suggested retail price.

Q. (By Mr. Siegel) Were there any other factors other than the fact that he charged more than the publisher's suggested retail price? A. In the case of Albrecht, no.

Q. You mentioned poor service. You mean poor service — A. Your question was so framed I couldn't answer it categorically because yes, we would have discontinued selling papers to Albrecht, or any other customer who doesn't perform the service, the Globe-Democrat needs, and except for this factor which might have arisen in the Albrecht case but did not, we would not have competed with him had he observed the suggested retail price.

Q. So the record is clear then, the only point of difference that you had, or any complaint that the publisher had against Albrecht, was the fact that he charged more than the publisher's suggested retail price? A. Yes, that is right.

Page 20:

Q. Well, if it be true that Kroner took over the delivery of Globe-Democrat newspapers to customers within route 99 as of August 1, 1964, was the publisher then continuing to deliver newspapers to customers within route 99 after that date? A. Well, if you assume what Kroner says is true, the answer is no, the publisher was not delivering papers.

Q. If that is true, the publisher was no longer competing then? A. Yes, that would be true.

Q. That the publisher was not continuing to compete after August 1, 1964? A. Right.

That is all of Mr. Bauman's deposition.

Mr. Cleaver's deposition—this is the deposition of Charles B. Cleaver, the Circulation Manager of the defendant. This was taken on October 26, 1964.

Page 2:

Q. Will you state your name, please? A. Charles B. Cleaver.

Q. By whom are you employed? A. Globe-Democrat Publishing Company.

On page 3:

Q. In what capacity are you employed by the Globe-Democrat? A. Circulation Manager.

Page 20:

Q. Now did the publisher place some advertisements in the newspapers with respect to route 99? A. Yes. There was an ad placed for a carrier for the route, yes.

Page 21:

Q. Well, from a letter or oral response, any response, whether it was oral or written, did you interview any such persons? A. I interviewed Mr. Kroner, yes.

Page 22:

Q. And what did you say to him? What did you tell him about the route? A. I told him exactly what it was.

Down below some other questions:

Q. All right, proceed with what you did tell him. A. I told him he didn't have to buy the customers like he had bought the route previously, that we would just give him the list of customers.

Q. And there was no charge made to him for those customers and addresses? A. That is right.

Q. And the right to deliver them? A. Right.

Q. All right. What else did you tell him? A. I told him I had no idea how long he would be on that route delivering it with that number of customers, whether it would be a week, a month, or six months, or two years, or any

length of time. He would get the profit just the same as he did on the route that he has.

Q. Did you tell him why these customers were being turned over to him? A. Yes.

Q. What did you tell him about that? A. I told him there was overcharging on the carrier, he had been charging people more, we had a number of calls on it, had letters on it, some of them had stopped the paper on account of it.

Q. The carrier you told him about was Mr. Albrecht? A. Yes.

* * * * *

Page 24:

Q. What is the customary practice and procedure followed by the publisher with respect to starts within a route as to who is advised and asked to deliver papers on new starts? A. They are sent out to whatever carrier it belongs to within that area.

Q. All right. Now was that practice or procedure followed with respect to route 99? A. No, we sent new starts to 198.

Q. To Mr. Kroner? A. That is right.

Q. Did you do that regardless of where the customer was located within route 99? A. Yes.

Page 25:

Q. Mr. Cleaver, when Mr. Kroner first became a carrier for a Globe-Democrat route did you speak with him? A. Yes.

Q. What instructions did you give, or what did you say to him with respect to the publisher's suggested retail price? A. Well, I am assuming I told him, I tell everyone—

Q. We are really not interested in what you are assuming. A. I don't remember the very words.

Q. Not the very words, but to the best of your recollection, what did you say to him? A. I told him what our

suggested retail price was. If that wasn't followed we had a perfect right to put competition in the same route with him.

Page 29; at the bottom:

Q. I would like to ask you again. Did the publisher agree with Kroner that Kroner was to deliver and charge customers within route 99 the same way that he delivered and charged customers within his other route which he had been authorized to handle? A. I would say yes.

That is all.

Plaintiff rests, Your Honor.

* * * * *

Motion for Directed Verdict.

At the close of plaintiff's case, defendant filed the following motion for direct verdict.

"Now at the close of plaintiff's evidence, defendant moves that the Court direct a verdict in favor of defendant under Count I of plaintiff's Complaint.

"And for grounds of its motion states that under the law and the evidence plaintiff is not entitled to recover under that Count.

"Now at the close of plaintiff's evidence, defendant moves that the Court direct a verdict in favor of defendant under Count II of plaintiff's Complaint.

"And for grounds of its motion states that under the law and the evidence plaintiff is not entitled to recover under that Count."

The Court reserved its ruling on said motion for a directed verdict.

Defendant's Evidence.

Mr. Hocker: Now Your Honor please, I would like to offer into evidence Defendant's Exhibit A, which is the agreement between the Pulitzer Publishing Company and the Globe-Democrat Publishing Company and the St. Louis, Missouri, Paper Carriers' Union No. 450, affiliated with the I. P. P. & A. U.

I would like to offer in evidence Defendant's Exhibit B, which is the reply of Mr. Bauman to the letter of Mr. Al Halls, dated May 16, 1961.

I would like to offer in evidence Defendant's Exhibit C, which is the Globe-Democrat news dealers' statement of policy, dated August 19, 1959, and Defendant's Exhibit D, which is the Globe-Democrat carriers' statement of policy, dated May 24, 1962, and I would like to ask leave to read certain portions of it to the jury, Your Honor.

The Court: Any objection?

Mr. Siegel: Is this from Exhibit D?

Mr. Hocker: It involves Exhibit A, B, C and D.

Mr. Siegel: If Your Honor please, there have been extensive portions of those exhibits already read to the jury, and if this would be a repetition of the same I would have objection to it.

The Court: Do you have any objection to the exhibits being admitted?

Mr. Siegel: No, Your Honor.

Mr. Hocker: Then I ask leave to pass them to the jury, Your Honor.

The Court: Very well. They may be admitted.

Now just a minute. What else have we got in the way of evidence?

Mr. Hocker: That is defendant's case, Your Honor.

The Court: Those are all the exhibits being offered?

Mr. Hocker: Yes, sir.

The Court: All right. They may be passed to the jury. Is there anything else that the jury has not seen that is an exhibit that anybody wants the jury to see?

Mr. Siegel: Yes, Your Honor. I think Plaintiff's Exhibits 1 through 4, I believe, were previously passed, and I would like the rest of Plaintiff's Exhibits 5 through 22, although I am not certain that No. 14 was received in evidence. If not, I would like to offer it.

Mr. Hocker: If Your Honor please, I don't want my four exhibits passed at the same time that plaintiff's 22 are passed. I think the plaintiff has closed its case and I would object to its reopening it to pass these exhibits.

The Court: You can pass your exhibits right now. Let's see what else we have got here in the way of exhibits.

Mr. Hocker: All right. Your Honor, so far as the union contract is concerned, I am only interested in Section 2 respecting price.

(At this point Defendant's Exhibits A, B, C and D were passed to the jury for their examination.)

The Court: Mr. Hocker, does the defendant have any additional testimony?

Mr. Hocker: Defendant rests, Your Honor.

Plaintiff's Motion for Directed Verdict.

Now, at the close of all of the evidence, Plaintiff moves the Court to direct the jury to return a verdict finding the issues herein in favor of the Plaintiff under Count II of the Plaintiff's Complaint as to liability and the fact of

damage, and, in support of this Motion, states the following grounds:

1. No evidence has been offered or received which raises a defense to the allegations contained in Plaintiff's Complaint.

2. The evidence in this case conclusively establishes and proves the allegations contained in Plaintiff's Complaint.

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Motion for Directed Verdict.

Mr. Dorsey: Yes, Your Honor. We would like to make a record of the grounds for our Motion for Directed Verdict. We feel that certainly the question of interstate commerce should not go to the jury when the plaintiff sells advertising to firms in New York and elsewhere throughout the United States for products they are selling for their readership. This includes their readership in Kirkwood and route 99. They are selling to the readership in interstate commerce to advertisers. It is clear in the record that they disseminate interstate advertising. When the defendant sells its newspapers for distribution in the St. Louis area, including route 99 in Kirkwood, it is selling advertising but especially news. Part of this news is gathered in interstate commerce, in Washington and all over the world. There is no question but what the interstate dissemination of news and advertising is a part of the flow of interstate commerce.

When the price of a newspaper to a home delivery customer in Kirkwood is attempted to be set by the actions of the defendant in combination or conspiracy with others, these actions of attempting to set the price take effect upon the flow of interstate commerce. When actions that

violate the Antitrust laws take effect upon the flow of interstate commerce rather than taking effect upon the flow of intrastate commerce but having some effect upon interstate commerce, then no inquiry need be made about the amount of restraint of interstate commerce or whether the actions sufficiently affect interstate commerce to be within the terms of the Act.

The question of a contractual right of the defendant to terminate the exclusive nature of route 99 should not go to the jury. It is clear in the Lessig case and in footnote 17 of the Osborn case that actions which violate the antitrust laws are a violation even if done in accordance with an express provision of the contract. This would, of course, be true with respect to a unilateral statement of policy of the defendant even should it be held that the plaintiff operating pursuant to that policy would become some sort of agreement.

We feel that as a matter of law there is liability with respect to interference with the plaintiff's business on route 99. The ruling case of Parke, Davis, which says that a supplier has a right to select his own customers, as decided in the Colgate case, but that as soon as he goes beyond the announcement of his suggested resale price and mere declination to sell to any customer who does not comply with that suggested resale price, he has formed a combination or conspiracy in restraint of trade and has violated Section 1 of the Sherman Act.

It is clear that the defendant went much beyond these permissible actions in this case. He entered into an agreement with Milne Sales to solicit the customers and potential customers of plaintiff within route 99. Pursuant to this agreement the customers and potential customers were solicited on the basis of statements that the plaintiff was charging more than the suggested resale price, and that they would see that they received the paper at the suggested resale price if they wanted to make the change.

Pursuant to this solicitation, the customers and potential customers of the plaintiff were instigated to and did make complaints against the plaintiff and over three hundred of them ceased doing business with him and he lost their business. It is plain that this constituted the most effective case of pressure by means of combination to overcome the independent business judgment of the plaintiff, which independent business judgment it is the very purpose of the antitrust laws to protect. It is plain that this was effective pressure because whereas for nearly three years the defendant had by his own pressure been trying to make the plaintiff charge the suggested resale price without any effect, nevertheless, within a few days after the pressure of his customers upon plaintiff's customers was added to the pressure of the defendant, plaintiff's independent judgment was in fact overcome, and he did start charging the defendant's suggested resale price.

Furthermore, there is, as a matter of law, liability with respect to this aspect of the case even should it be held that defendant's statement of policy and the plaintiff's subsequent selling of papers amounted to an agreement with respect to price between the plaintiff and defendant. If such an agreement came into effect, it was an unlawful agreement under Section 1 of the Sherman Act. And plaintiff would not be in *pari delicto* but could sue for his injuries resulting from this, as shown in the case of *Simpson v. Union Oil Company* and *Osborn v. Sinclair Oil Company*.

Liability is clear as a matter of law with respect to termination. Termination is unlawful if done pursuant to an unlawful combination or conspiracy. The defendant had entered into a combination or conspiracy with Kroner to enable the defendant to have newspapers delivered on route 99 without delivering them through the plaintiff. This was an additional combination or conspiracy with respect to interference with the plaintiff's business. And this combination or conspiracy between

Kroner and defendant was in effect prior to the time of the termination of plaintiff's carrier relationship, at the time of such termination, and after the date of such termination and the arrangement with Kroner to deliver the papers to the customers taken away from plaintiff enabled the defendant to keep these customers away from the plaintiff and to deny him the right to sell these customers to the customer to whom he sold his route. This was a continuing combination or conspiracy, and the fact that it was still continuing at the time of the termination to coerce the plaintiff to comply with defendant's resale price policy is shown by evidence in the record that after termination when Albrecht and Schwarzenbach, his prospective customer, talked with officers of the defendant the business manager of defendant at that time suggested to plaintiff that if he bought back the customers from Kroner that he could continue to deliver the Globe-Democrat on route 99 if he would then and thereafter comply with defendant's resale price policy.

The combination and conspiracy with Kroner and the acts of solicitation in combination with Milne Sales cannot be made innocent acts and not violation of the anti-trust laws on the ground that they were an exercise of the right to compete whether or not this right is asserted on the basis of a contract with the plaintiff. If the defendant had a right to compete with the plaintiff on route 99 or had a right to end the exclusive nature of route 99 and allow some independent carrier to compete, this right would only extend to either the defendant's entering into the carrier business in good faith with the intent to remain in the carrier business and profit from that and remain indefinitely. The evidence is overwhelming that the defendant did not have such intent, did not remain, and therefore was not competing in good faith.

With respect to the right to supply papers to another who would then compete with the plaintiff on route 99, if there was such a right, it would only extend to announce-

ing that route 99 was no longer exclusive and that the defendant would be willing to sell newspapers to another carrier for delivery on route 99, leaving it to such an independent carrier to go in and make his own solicitation without concert, combination, or conspiracy with the defendant; and certainly not pursuant to the defendant's own solicitation, but would give only the right for the independent carrier to go in on his own and get such customers as he could persuade to buy from him by good faith methods of competition. Then the defendant could sell him such newspapers as he wished to purchase.

This leads to the question of determination if the policy statement by the defendant and subsequent actions of the plaintiff did in fact give rise to any sort of agreement with respect to them. The defendant's termination for refusal of the plaintiff to continue to charge the defendant's price in accordance with the agreement which would be an unlawful agreement, would be an unlawful termination. This is clear in the Simpson case and in the Osborn case.

If there was no such agreement between the plaintiff and defendant, and, if, as we do not admit, the termination was not pursuant to the existing combination or conspiracy but was unilateral, it would still be an unlawful termination because it was for the purpose of coercing the plaintiff to charge the defendant's resale price and would then be for the purpose of coercing him to go along with the unlawful scheme of resale price maintenance, which would in this case be unlawful because of the combination or conspiracy between the defendant and Milne, the defendant and plaintiff's customers, and defendant and Kroner.

Plaintiff feels that as a matter of law that there are damages resulting from the unlawful acts in combination and conspiracy that resulted in interference with the plaintiff's business and that resulted in unlawful termination and requests that the Court instruct the jury not only

as to interstate commerce and that a contractual right would not be a defense, but also on the fact of liability both for interference and termination and on the fact of damages, but not the amount of damage, with respect both to interference and termination.

Thank you.

The Court: Mr. Hocker?

Mr. Hocker: I see two issues in the case, Your Honor, and only two issues: one is the question of whether there was any conspiracy or combination to which the defendant was a party, which is certainly a factual issue, that is a conspiracy or combination in restraint of trade. And second, whether there was any substantial effect on interstate commerce by such a conspiracy.

* * * * *

The Court: Gentlemen, in accordance with my particular practice, I intend to reserve ruling on all of these motions, including that of the defendant, for a directed verdict and at such time as we get to the Court's charge to the jury, we will let the record stand.

* * * * *

The Court: Miss Wood, let the record show at the close of all the evidence in the case and after a Motion for a Directed Verdict was filed by the plaintiff, and during the time that the Charge of the Court was being considered by the attorneys for the plaintiff and the defendant and the persons present were Donald Siegel, Gray Dorsey and Lon Hocker, the plaintiff filed a motion to amend his Complaint, which is accepted by the Court; and the purpose of the amendment to the Complaint is to conform to the evidence.

The plaintiff and defendant previously by agreement, prior to the trial of the case before the jury, had stipulated that Count I, constituting a common law count for

malicious business interference, was dismissed by the plaintiff.

Plaintiff by its motion to amend the Complaint now desires to eliminate from the consideration of the jury any reference to a conspiracy under Section 1 of the Sherman Act or an illegal agreement under Section 1 of the Sherman Act, and desires that the case be submitted to the jury solely on the question of a combination under Section 1 of the Sherman Act.

Is that correct, gentlemen?

Mr. Siegel: Yes.

Mr. Dorsey: Yes. Thank you.

The Court: Very well.

Mr. Dorsey: We should amend our Motion for Directed Verdict to conform to this.

The Court: That you made already.

Mr. Siegel: The grounds were stated before the motion was made and we reiterate them.

The Court: The Motion for Directed Verdict is also amended in accordance with the Complaint.

Motion to Amend Complaint.

(Filed in U. S. District Court May 12, 1965.)

Comes now plaintiff, and as grounds for his motion, states that:

1. Count II of plaintiff's complaint consists of Paragraphs 1 through 16 which are set forth under Count I of said complaint, and at the time said complaint was filed, said Paragraphs 1 through 16 were in accordance with the allegations of Paragraph 17 incorporated in Count II by reference, as though each and every allegation in

said Paragraphs 1 through 16 were set forth in full in Count II.

2. In order to conform to the evidence, plaintiff here-with amends: Line 2 of Paragraph 13 of Page 3,

Lines 2 & 3 of Paragraph 14 of Page 4,

Lines 2, 5 & 6 of Paragraph 19 of Page 5,

by substituting in lieu of the words: "... a person or persons unknown to plaintiff," the words: "plaintiff's customers and/or Milne Circulations Sales Inc. and/or George Kroner," and amends: Line 2 of Paragraph 15 of Page 4, by substituting in lieu of the words: "... third person or persons," the words: "plaintiff's customers and/or Milne Circulations Sales Inc. and/or George Kroner."

3. Plaintiff hereby amends its complaint and supplemental complaint by deleting therefrom the words: "conspired," "colluded," "conspire," "conspiracies," "collusion," wherever those words appear in plaintiff's complaint or supplemental complaint.

BARTLEY, SIEGEL & BARTLEY,

By

DONALD S. SIEGEL,

130 South Bemiston Avenue,

Clayton, Missouri, 63105,

and

.....
GRAY L. DORSEY,

122 Ridge Crest Drive,

Chesterfield, Missouri,

HOpkins 9-3362.

* * * * *

Objections to Instructions.

Mr. Dorsey: Plaintiff then objects to the instructions in that plaintiff's requested instructions 16, 17 and 18, which were refused in significant parts by the Court, should have been given because they do relate to general statements of law and to the specific facts and evidence in the case.

Plaintiff objects to the Charge in that it qualifies the instructions with respect to present value of loss of future profits by the following: "Less the reasonable value of the return plaintiff would have made on the amount he received for the sale of his route and less the reasonable value of the services of the plaintiff and his wife necessary to the operation of the route during the period of time future profits are calculated;" in that plaintiff feels it is erroneous under the Lessig case, and that plaintiff further objects to that under paragraph 4 of the damage instruction of the Court on page 16 of the Court's Charge, in that it does not direct the jury as to the other type of evidence bearing on the loss of future profits which were put in by the plaintiff, in accordance with plaintiff's requested instruction number 21, which was refused in this respect.

Plaintiff further objects to the quoted language just above being included in this charge on damages, in that there was no evidence put in from which the jury could form any independent judgment with respect to the amount of such reduction from loss of future profits. We feel certain that it is confusing and misleading.

The plaintiff objects to the refusal to give plaintiff's substitute instruction number 22, which would inform the jury of the reason for giving treble damages and particularly for allowing loss of future profits to the plaintiff in a private anti-trust suit in view of repeated statements of the Courts of Appeal that not to give such future loss of profits would frustrate the purpose of supplementing the enforcement of the anti-trust law, which is a major

purpose for the inclusion of that provision in the anti-trust law.

Plaintiff objects to the Court's refusal to give that part of its requested instruction number 24 which was not included in the Charge to the jury, in that the jury was not instructed that the policy statement of defendant was not a contract unless it was accepted by plaintiff.

Plaintiff objects to the refusal to give plaintiff's requested instructions numbers 25, 26 and 27 stating the nature or definition of "combination" to the extent that this was not included in the Charge to the jury, as to which the plaintiff objects that the Charge of the Court requires a finding of a common purpose to the finding of a combination.

Plaintiff objects to the refusal to give plaintiff's instruction number 28 that would direct the jury that in determining the amount of damages awarded to the plaintiff for present value of future profits they should not consider whether plaintiff may earn any income from any business or employment in the future.

I think that covers it.

* * * * *

Plaintiff's Requested Instructions Refused
by Court.

Instruction No. 16.

You are instructed that if you find and believe by the preponderance or greater weight of the evidence introduced in this case, that Defendant, The Herald Company, and/or together with George Kroner and/or Milne Circulation Sales, Inc., and/or the customers of the Plaintiff, beginning on or about May 20, 1964, combined to restrain trade, then you will find that the Defendant has violated Section 1 of the Sherman Act. If you find that the Defendant, directly or through Milne

Sales, contacted the customers of Plaintiff by letter, telephone or door-to-door solicitation, and informed them that they were paying more than the suggested retail price for the Globe-Democrat, and that Defendant would deliver the paper to them for the suggested retail price if they so desired; and if you find that Defendant was not at that time in the business of being a carrier of newspapers on home delivery routes, had no intention of going into the newspaper carrier business on home delivery routes had no equipment and no employees for engaging in the carrier business, had no intention of serving the customers it was soliciting as a newspaper carrier, except temporarily, and did not serve these customers as a newspaper carrier except for a very short period of time; and if you find that these solicitations did result in some 300 customers being lost to the Plaintiff; and if you find that these customers were turned over to George Kroner without charge and with the understanding that he would deliver the Globe-Democrat to these customers within the territorial boundaries of the Route previously recognized as the exclusive Route of the Plaintiff; and if you find that the Defendant refused to give new starts within that territory to the Plaintiff, but gave them instead to Kroner; and if you find that the pressure resulting from the customers and former customers of the Plaintiff getting in touch with him and questioning the price that he was charging for the Globe-Democrat, and the pressure resulting from the fact that the Defendant and Kroner, by concerted action, were preventing the Plaintiff from getting new business which would normally go to him, and were interfering with Plaintiff getting back his old customers; and if you find that these pressures resulting from the combined action of Defendant and Plaintiff's customers, and of the Defendant and Milne Circulation Sales, Inc., and of the Defendant and Kroner were designed to cause the Plaintiff to charge the retail price suggested by the Defendant, then you will find that Defendant has violated Section 1 of the Sherman Act.

Instruction No. 17.

You are instructed that if you find that the termination of the Plaintiff's carrier relationship with the Defendant was done pursuant to the combination and conspiracy which was directed at overcoming his independent business judgment and causing him to charge the retail price suggested by the Defendant, then you will find that this termination was a violation of Section 1 of the Sherman Act. If you find that the only dissatisfaction that Defendant had with Plaintiff, as a carrier, was his refusal to charge the suggested retail price; and if you find that because of this dissatisfaction, the Defendant engaged in letter, telephone and door-to-door solicitation and took some 300 customers away from the Plaintiff, and further refused to give Plaintiff new starts; and if you find that after this action was commenced, Defendant terminated Plaintiff's carrier relationship; and if you find that Defendant announced that it would refuse to give the 300 customers taken from the Plaintiff to a purchaser of Plaintiff's Route; and if you find that the Defendant announced it would refuse to give new starts in that area to the purchaser of the Plaintiff's Route; and if you find and believe from the evidence that the purpose of the termination and of withholding these customers and new starts from a purchaser of Plaintiff's Route was to coerce the Plaintiff into complying with the Defendant's suggested resale price, if he should dismiss his suit and resume his carrier route, and if you find that the Defendant was able to withhold these customers and new starts from the purchaser of Plaintiff's Route only because of the combination or concerted action with Kroner, Plaintiff's customers and Milne Circulation Sales, Inc., then you will find that the termination of Plaintiff's carrier relationship was done pursuant to an unlawful combination or conspiracy and was a violation of Section 1 of the Sherman Act.

Instruction No. 18.

If you find that the Defendant did violate Section 1 of the Sherman Act by entwining Milne Circulation Sales, Inc., the customers of the Plaintiff and Kroner in a combination or concert of actions to coerce the Plaintiff to comply with its suggested resale price, thereby going beyond such pressure as would have been exerted by a mere declination to sell upon refusal to follow suggested resale price, according to the instructions that I have given you above, and if you find that Defendant terminated the carrier relationship of the Plaintiff unilaterally, and not in concert or combination with any other persons, but if you further find that this unilateral act of termination was done because of Plaintiff's refusal to follow the resale price demanded by the unlawful combination or conspiracy and thus, himself, to enter into an unlawful combination with the Defendant, then you will find that the termination, though unilaterally done, was caused by the unlawful acts of the Defendant, and that any injuries to the Plaintiff were the proximate result of the unlawful acts of the Defendant that were in violation of Section 1 of the Sherman Act.

Instruction No. 21.

In connection with the award of any damages, you are instructed that in arriving at the amount thereof you should attempt to do so with reasonable certainty; you should not speculate or guess as to the extent of such damages to any greater extent than is necessary to compensate the Plaintiff for any damage which was done to him in his business and property. You should not speculate or guess as to the question of whether or not damages have actually been suffered. To render any verdict for damages you must find that as a direct and proximate result of any unlawful conduct of the Defendant, as I have elsewhere in this charge instructed you, the Plain-

tiff's business or property was damaged. In order to find damages for the Plaintiff you must find that by the preponderance or greater weight of the evidence, damages actually were suffered by the Plaintiff as a direct and proximate result of the unlawful actions of the Defendant.

In determining the amount of damages, if any, awarded to Plaintiff, in this type of case where positive proof is not possible, the jury's estimate of the amount of damages is allowable. Any other rule would make it impossible, at times, to compensate where a wrong has been done. So you should take into consideration all the facts and circumstances surrounding the transactions, and estimate, as accurately as you can, the reasonable amount of such damages. The amount of damages is not rendered uncertain because it cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded although the result be only approximate, and no party that has violated the antitrust law is entitled to complain that the precise damages suffered cannot be measured exactly.

You should make the determination of the amount of damages as a matter of judgment from the evidence. You may consider:

- (1) the amount of net profit Plaintiff would have received from sales to the 330 customers between June and October 31, 1964, except for the unlawful acts of the Defendant;
- (2) the expenses that Plaintiff sustained between June and October 31, 1964, as a result of the unlawful acts of the Defendant;
- (3) the difference between the amount Plaintiff actually received from the sale of newspaper Route 99 and the amount he would have received as shown by the evidence except for the unlawful acts of the Defendant;

(4) the present value of profits Plaintiff would reasonably be expected to have made in the future except for the unlawful acts of the Defendant, in connection with which you may consider the net profits Plaintiff derived from Route 99 in years prior to the time of Defendant's unlawful acts of combination and conspiracy and resulting interference and unlawful termination, evidence of the stability of this type of business, Plaintiff's ability and competence as a carrier, evidence as to whether in every respect except pricing policy Plaintiff was a good carrier and entirely satisfactory to the Defendant, Plaintiff's age, health and ability to continue operating Route 99, evidence as to his intent to continue, the kind of work involved in the carrier business, evidence of Plaintiff's worklife expectancy, evidence as to the present value of expected future profits, and other evidence.

Instruction No. 22.

You are instructed that the grant to persons injured by violations of the antitrust laws of the right to sue in the federal courts for treble the amount of damages suffered is intended not only to compensate persons wrongfully injured but also to multiply the agencies helping to enforce the antitrust laws and thus make them more effective. This salutary purpose would be in large measure frustrated if the plaintiff in a private antitrust suit were not allowed to recover damages unless the amount could be proved with complete certainty and exactness. The amount of loss of future profits is difficult to determine and cannot be proved with complete certainty. However, in many private antitrust actions, as in this one, the principal element of damage is the loss of future profits caused by unlawful termination. Therefore, you should determine the amount to be awarded for such future loss of profits as a matter of judgment from the evidence, as I have instructed you, bearing in mind that this is an action for

damages for unlawful injuries to Plaintiff's business or property, and Plaintiff is entitled to recover for all injuries resulting directly and proximately from Defendant's unlawful acts in violation of the antitrust laws.

Instruction No. 24.

You are instructed that the policy statement of Defendant which purported to give it the right to end the exclusive nature of any carrier's route for failure to comply with the resale price policy of Defendant could not give rise to a contract unless there was some action on the part of Plaintiff indicating acceptance of such a provision; that refusal to follow the resale price policy would be evidence that Plaintiff did not accept this provision, and that if such a contract did arise actions by Defendant to compel Plaintiff to adhere to its resale prices by a coercive scheme not limited to refusal to deal announced in advance would be unlawful, even though done in exercise of a right expressly granted by such a contract.

Instruction No. 25.

The Court instructs you that an unlawful combination is defined as conduct or action on the part of a seller to effect adherence to his resale price policy which goes beyond announcing a resale price policy and declining to sell to those who fail or refuse to adhere to his resale price policy.

Instruction No. 26.

The Court instructs you that when a seller does no more than announce a resale price policy and a declination to sell to those who fail or refuse to adhere to such policy, he has not put together an unlawful combination. If, however, the seller goes further and engages in actions with one or more persons, extending beyond the bare announce-

ment of his resale price policy and a declination to sell, in order to effect adherence to his resale price policy, then he has engaged in an unlawful combination in violation of the antitrust laws.

Instruction No. 27.

The Court instructs you that when a seller does no more than announce a resale price policy and declines to sell to those who fail or refuse to adhere to such policy he has not put together an unlawful combination. If, however, the seller goes further and engages in actions or conduct with one or more persons extending beyond the announcement of his resale price policy and a declination to sell, and employs other means to effect adherence to his resale price policy, then he has engaged in an unlawful combination in violation of the antitrust laws.

Instruction No. 28.

The Court instructs you that in determining the amount of damages, if any, awarded to plaintiff for the present value of profits plaintiff would reasonably be expected to have made in the future except for any unlawful acts of the defendant, you should not consider whether plaintiff may earn any income from any business or employment in the future.

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Court's Charge to the Jury.

The Court: Members of the jury:

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The plaintiff in this case, Lester J. Albrecht, is an individual who was an independent contractor, that is, he was in business for himself, and his business was carrying the Globe-Democrat newspaper and delivering that paper

to the homes of residents in an area of Kirkwood, which for many years had been designated as route 99. The defendant is The Herald Company, a New York corporation which publishes the Globe-Democrat in St. Louis, and which does this in St. Louis as the Globe-Democrat Publishing Company.

Plaintiff seeks damages for injury to his business or property claimed to have been suffered as a result of defendant's alleged violations of the antitrust laws of the United States.

Specifically, plaintiff claims

(1) that defendant entered into an unlawful combination with Milne Circulation Sales, Inc., and/or George Kroner and/or plaintiff's customers to fix or maintain the defendant's suggested retail price of the Globe-Democrat newspapers, and that the action of defendant in soliciting the customers of plaintiff and of terminating plaintiff's paper route were coercive and for the purpose of enforcing the suggested retail price on route 99 in the Kirkwood area, and that such actions have restrained trade in the distribution of the Globe-Democrat in interstate commerce;

(2) that these activities have proximately caused damage to plaintiff's business or property.

The defendant's position is:

(1) that no combination was ever formed between the defendant and any other person or corporation, and that the actions of the defendant or any other person acting with it were not coercive;

(2) that the plaintiff had failed to sustain the burden of proof by the preponderance of the evidence;

(3) that the plaintiff has suffered no damage as a direct result of a violation, if any, of the antitrust laws.

The Court instructs the jury that this action is based upon what is commonly known as the Sherman Act.

Section 1 of the Sherman Antitrust Act, dealing with restraints of trade, provides that:

“Every contract, combination . . . or conspiracy, in restraint of (interstate) trade or commerce . . . is . . . illegal . . .”

The Clayton Act provides a remedy for violation of the Sherman Act. Section 4 of the Clayton Act provides:

“That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney’s fee.”

You are instructed that the business of obtaining and disseminating local and national advertising, local, national and worldwide news as is done by the defendant in this action is interstate commerce within the meaning of the Act, and that the actions of the defendant in disseminating its newspaper within route 99 in Kirkwood and in other areas within Missouri and Illinois, were done in interstate commerce and are, therefore, subject to the prohibitions contained in the Sherman Act.

The word “person” as used in the Antitrust Law, is not restricted to natural persons, but includes corporations.

You are instructed that a corporation, such as defendant The Herald Company can be a member of a combination the same as a natural person, and the officers, directors and agents of defendant The Herald Company can be members. However, a corporation and its officers

cannot, just between themselves, constitute a combination. You can find a combination in this case only if you find that at least one other person or corporation combined with defendant The Herald Company for unlawful purposes.

The Court instructs the jury that a corporation can act only by and through its agents, officers, directors, servants, and employees. Therefore, any act on the part of one of its agents, officers, directors, servants, and employees within the scope and course of his employment would be the act of the corporation and the corporation would be responsible and liable therefor. Acts of a corporate agent, officer, director or employee are within the "scope and course of employment" even though not specifically authorized by the corporation, if they are done, even though mistakenly or ill-advisedly, with a view to further the corporation's interests, under the general authority and direction of the corporation and if they naturally arise from the performance of such agents, officers, directors, servants, or employees' work.

The Court instructs the jury that there are two kinds of evidence: direct and circumstantial. Direct evidence is that sort of evidence by which a fact is proven directly, and without inference from other facts. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the essence of known facts. In arriving at your verdict, you are to consider all of the evidence, both direct and circumstantial.

Before a fact sought to be established can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances directly proved by the evidence shall reasonably give rise to an inference of the fact sought to be established, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from circumstances directly proved by the evi-

dence, one consistent with the fact sought to be proved and the other inconsistent therewith, you should not infer the fact sought to be proved from such circumstances alone.

Moreover, when the right of recovery depends upon the existence of any particular fact, which must be inferred from proven facts, it is not permissible to make such an inference in the face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.

The antitrust laws are intended to foster and preserve our system of free, competitive enterprise, to preserve the fullest practicable competition in the market place and any business or industry.

Thus, any interference by combination, with the ordinary and usual competitive-pricing system of the open market constitutes an unreasonable restraint of trade, and is in itself unlawful. The mere fact that there may be business justifications for the fixing or maintaining of prices, or the fact that the fixed or maintained prices may be reasonable, will not constitute a legal justification for such fixing or maintaining of prices.

Intent is the purpose or aim or state of mind with which one acts or fails to act. A person is usually held to intend to do or fail to do everything such person knowingly does in fact do or fail to do. It is reasonable to infer also that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference and find that a person intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by such person.

An act or failure to act is done knowingly, if done voluntarily and purposely, and not because of mistake or inadvertance or other innocent reason.

Intent may be proved by indirect evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. What a person does or fails to do may indicate either intent or lack of intent.

In determining any issue involving intent, the jury should examine all the facts and circumstances in evidence which tend to shed light on state of mind.

You are instructed that the burden of proof rests upon the plaintiff to prove each of the essential elements necessary under the instructions by a preponderance of the evidence in the case. Therefore, if the plaintiff fails to sustain this burden of proof, your verdict shall be against the plaintiff and in favor of the defendant.

The Court instructs the jury that the plaintiff has abandoned as the ground for recovery in this case the allegations of his complaint that the defendant did conspire and collude with some other person or persons, and the allegation of his complaint that the defendant has entered into illegal contracts or agreements or has unlawfully conspired with a person or persons, and plaintiff has abandoned the allegation that such alleged conspiracies were accomplished and brought about by illegal contracts or agreements between the publisher and a person or persons, and you will not consider these allegations or anything that has been said by Court or counsel in regard to these in arriving at your verdict.

The only ground of liability submitted to you, therefore, is the question of whether the defendant combined with some other person or persons to violate Section 1 of

Title 15 U. S. C. A., providing "Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal"

The effect of this act is to forbid combinations of traders to suppress competition, as competition, not combination, should be the law of trade.

A combination is a concerted course of action between the defendant and one or more persons. This may be with an agreement either expressed or implied or it may be without an agreement. In order to have a combination there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means. The purpose of the combination must be the applying of coercion in some manner which unduly hinders or obstructs the free and natural flow of commerce in interstate trade.

A seller has the right under the law to announce a resale price policy and decline to sell to those persons who fail to refuse to adhere to this policy. Such action is not an unlawful combination in violation of the Sherman Act.

A seller may not announce a suggested resale price and thereafter enter into a combination with another person or persons, which goes beyond the mere refusal to sell and applies coercive action to enforce or obtain adherence to the suggested resale price. This is an unlawful combination prohibited by the Sherman Act.

This is true whether the suggested price is a minimum price of a maximum price.

Nothing in the Sherman Act requires that a seller of a product must grant to a customer the exclusive right to resell the product in a given territory, and for this reason it is not a violation of the act for the seller of a

product either to complete in good faith with his own customer in a given territory or to permit any other customer to compete with him in that territory. Indeed, it is not a violation of the act for the seller of a product to announce, so long as he neither conspires or combines with another person for this purpose, that he will refuse to sell to any customer who does not, in turn, resell at the suggested resale price or to make adherence to the suggested price a condition to the maintenance of the exclusive right to sell in a particular territory, nor to terminate commercial relationships with a customer who does not adhere to the suggested retail price; nor is it a violation of the Act to refuse to deal with someone solely because he has brought a lawsuit against his supplier.

The gist of the right of action claimed by the plaintiff under this Act is that the defendant combined with some other person in a combination designed to coerce the plaintiff to maintain adherence to the suggested retail price.

To engage in "competition" means to take actions which are calculated to acquire the business or customers of others in the sale of a product or commodity where the effort to gain that business or customers is made in "good faith". Good faith in this connection means for the purpose of engaging in the sale of that commodity or product, and getting customers for oneself, and not for the sole purpose of inflicting injury upon another by taking his customers away from him. Evidence showing good faith or bad faith is: whether or not the actor remains in that business after he has accomplished the injury; whether or not his acts and statements indicate that he is, in fact, intending to engage in that line of business or commerce for his own benefit and profit. Actions calculated to acquire customers or patronage, but not done in good faith, as indicated by the enumerated criteria, are, in fact, not competition.

If you find that a combination was entered into between the defendant and Milne Circulation Sales, Inc., and/or George Kroner and/or the plaintiff's customers, and pursuant to such combination the defendant or George Kroner or Milne Circulation Sales, Inc., solicited the plaintiff's customers for the purpose of coercing the plaintiff to follow the defendant's suggested retail price, then you shall find that the defendant violated the antitrust laws.

If you find an unlawful combination was formed and that the defendant pursuant to such combination terminated the working relationship between itself and the plaintiff to coerce the plaintiff to follow the defendant's suggested retail price, or terminated because plaintiff refused to comply with the defendant's suggested retail price, then this constitutes a violation of the antitrust laws, even if the right to compete or to terminate was reserved to the defendant in a statement of policy.

If you find that no combination has been proved, then your verdict should be for the defendant; even if you find that a combination existed then before you may find for the plaintiff, you must find that damage resulting to the defendant was the result of this combination. In other words, if you find that the damage done to the plaintiff, if any, was caused not by the combination, then even though you find that such combination did exist, your verdict will be in favor of the defendant.

Any injury or damage is proximately caused by an act or omission whenever it appears that the act or omission played a substantial part in actually bringing about or causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

If under the instructions of the Court, you should find that the plaintiff is entitled to a verdict, the law provides

that the plaintiff is to be fairly compensated for all damage, if any, to his business or property which was proximately caused by the defendant's conduct in violation of the antitrust laws.

In connection with the award of damages, if any, you are instructed that in arriving at the amount thereof you should attempt to do so with reasonable certainty, you should not speculate or guess as to the question of whether or not damages have actually been suffered. To render any verdict for damages you must find that as a direct and proximate result of any unlawful conduct of the defendant, as I have elsewhere in this charge instructed you, the plaintiff's business or property was damaged.

In determining the amount of damages, if any, awarded to plaintiff, you should take into consideration all the facts and circumstances surrounding the transaction and to arrive as accurately as you can, at the reasonable amount of such damages. The amount of damages is not rendered uncertain because it cannot be calculated with absolute exactness.

You should make the determination of the amount of damages as a matter of judgment from the evidence. You may consider:

(1) the amount of net profit, if any, plaintiff would have received from sales to customers between June and October 31, 1964, except for any unlawful acts of the defendant;

(2) the expenses, if any, that plaintiff sustained between June and October 31, 1964, as a result of any unlawful acts of the defendant;

(3) the difference between the amount plaintiff actually received from the sale of newspaper route 99 and the amount he would have received as shown by the evidence except for any unlawful acts of the defendant;

(4) the present value of net profits plaintiff would reasonably be expected to have made in the future, except for any unlawful acts of the defendant, less the reasonable value of the return plaintiff would have made on the amount he received for the sale of his route and less the reasonable value of the services of the plaintiff and his wife necessary to the operation of the route during the period of time future profits are calculated, in connection with which you may consider the net profits plaintiff derived from route 99 in prior years, and any other evidence.

As previously stated to you, the law provides that:

“Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

If, under the instructions of the Court, you should find that the plaintiff is entitled to recover, your verdict will be for only the actual damages suffered by the plaintiff. That is the amount of damages as you find from the evidence in the case is reasonably necessary to compensate the plaintiff for any injury to his business or property proximately caused by one or more of the violations of the antitrust laws which you find the defendant has committed. You will not treble that amount, nor will you include any sum for cost of suit or a reasonable attorney’s fee, since it is the function and duty of the Court, in the event the jury returns a verdict in favor of the plaintiff, to treble that amount in the judgment rendered for the plaintiff and also to determine and include in the judgment the amount properly to be allowed as the plaintiff’s cost of suit, including a reasonable attorney’s fee.

The Court has caused to be prepared for you two blank forms of verdict. If your finding shall be for the plaintiff,

you will use one form of verdict and insert in the blank left for that purpose the amount of actual damages awarded to said plaintiff, and one of your number will sign it as foreman. If your finding be in favor of defendant, you will use the other form of verdict, having one of your number sign it as foreman. When you have agreed upon a verdict you will return it into Court.

You understand, of course, that in this Court, your verdict must be unanimous. Twelve in all must agree to such verdict.

You may retire to your jury room with the bailiff.

United States District Court,
Eastern District of Missouri,
Eastern Division.

Lester J. Albrecht,	Plaintiff,	} Civil Action. File Number 64 C 302 (2).
vs.		
The Herald Company, a Corpora- tion d/b/as Globe-Democrat Pub- lishing Company,	Defendant.	

Judgment.

(Filed in U. S. District Court May 13, 1965.)

This action came on for trial before the Court and a jury, Honorable James H. Meredith, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

It is Ordered and Adjudged that the plaintiff take nothing by his cause of action, that the action be dis-

missed on the merits, and that the defendant recover of the plaintiff Lester J. Albrecht its costs of action.

Dated at St. Louis, Missouri, this 13th day of May, 1965.

HAROLD G. PRYCE,

Clerk of Court,

By ROBERT H. BOUSMAN,

Deputy Clerk.

Motion of Plaintiff for Judgment Notwithstanding the Verdict, and, Alternatively, for a New Trial.

(Filed in U. S. District Court May 21, 1965.)

Comes now the Plaintiff, Lester J. Albrecht, and files herewith, and submits to the Court the following Motions:

Motion for Judgment Notwithstanding the Verdict.

The Plaintiff moves the Court to set aside the verdict returned on May 13, 1965, in favor of Defendant and the judgment entered thereon on May 13, 1965, and to enter judgment in favor of the Plaintiff in accordance with his Motion for Directed Verdict made at the conclusion of all the evidence, on which this Court reserved its ruling.

In support thereof, the Plaintiff states that the uncontroverted evidence, including Defendant's admission, established to a point where reasonable minds could not differ that a violation of Section 1 of the Sherman Act, as applied to resale price maintenance, had occurred.

First, Plaintiff states that the evidence on the questions of liability and the fact of damage overwhelmingly established that Defendant put together an unlawful combination in violation of the Sherman Act, to Plaintiff's damage. The evidence on these questions was uncontroverted and, indeed, admitted by Defendant. Defendant presented no

witnesses, and offered no evidence in contradiction of Plaintiff's evidence. As appears from the following summary of the evidence, there was no conflict in the evidence on the fact of liability or on the fact of damage, and nothing, therefore, for the jury to pass on in connection therewith.

The facts are uncontradicted, and furthermore, even admitted by the Defendant, that the Defendant and Milne Sales solicited the customers and potential customers of the Plaintiff; that this solicitation was not within the realm of good faith competition for Defendant admitted that it was not in the carrier business, did not want to be, had neither the necessary employees nor equipment, did not attempt to acquire customers other than those taken from Plaintiff, had never even considered making a profit from delivering papers and delivered papers only temporarily until it could find a carrier to deliver them; that the solicitation resulted in much pressure on the Plaintiff by his customers with respect to the price he was charging; that this pressure directly caused the loss of more than three hundred customers; that the additional pressure of Milne Sales's solicitation and the customers, because of a continuous flow of stop orders, did, in fact, overcome the Plaintiff's independent judgment and cause him to comply with the Defendant's suggested retail price, although this fact was not communicated to the Defendant; that Milne Sales knew that this kind of solicitation had never before been requested or undertaken and was not for the purpose of simply getting new subscribers, for which they had been employed in the past, but was for the purpose of informing the customers of Plaintiff that Plaintiff was charging more than the suggested retail price, and that Defendant was anxious to have papers delivered to home delivery customers at its suggested retail price by a method other than by Plaintiff; Milne Sales and these customers knew that their demands upon the

Plaintiff and said solicitation were for the purpose of and were calculated to cause the Plaintiff to comply with the Defendant's suggested retail price. The Defendant admitted that all of the aforementioned acts and things were done for the purpose of maintaining its suggested retail price.

It is further uncontroverted that Kroner received from the Defendant the customers taken from the Plaintiff without making any payment for them, and entered into an understanding and agreement with Defendant that he was to bill said customers taken from Plaintiff at Defendant's prescribed rate of \$1.60 per month, and that he was to have the right to serve them only temporarily, until such time as the Plaintiff "got straightened out" with the Defendant; that Kroner knew that the only thing to be straightened out between Plaintiff and Defendant was the question of whether Plaintiff would follow Defendant's resale price policy; that Kroner's delivery of the Globe-Democrat to the former customers of the Plaintiff enabled the Defendant to withhold these customers and new starts from the Plaintiff; that even after Kroner commenced delivering papers to Plaintiff's former customers, Defendant told Plaintiff it would give him back all the customers he had prior to May 20, 1964, if Plaintiff would charge no more than Defendant's suggested retail price; that after termination by the Defendant of Plaintiff's carrier relationship, Defendant refused to take back the customers given to Kroner, although by agreement, it had the right to do so, and refused to allow the Plaintiff to include these customers and any new starts in the customer list Plaintiff proposed to sell to a purchaser before Defendant ceased selling papers to the Plaintiff pursuant to the termination; that Kroner knew that his delivering to the Plaintiff's former customers and to new starts on Route 99 would coerce the Plaintiff to comply with Defendant's suggested resale price policy, but knowingly acted in con-

cert with the Defendant to accomplish that coercion; that even after Defendant advised Plaintiff he was terminated and Defendant would not sell him papers after 60 days, Defendant still attempted to coerce Plaintiff to resume delivering papers as the regular carrier on Route 99, provided he would charge no more than Defendant's suggested retail price (this, too, was uncontroverted even though Defendant's officer who made said statements was asked to and did remain in Court, the record shows, to hear such testimony, and after such testimony was adduced, Defendant offered no testimony); that this combination between Kroner and the Defendant, for the purpose of securing Plaintiff's adherence to Defendant's resale price policy was in effect before, at, and after the time of termination, and the termination was pursuant to and within the contemporaneous framework of the unlawful combination, or in any event, was for refusal to comply with Defendant's resale price policy.

Second, the Plaintiff states that under the law of the **Parke, Davis** case, no common purpose is required in order to put together an unlawful combination for the purpose of resale price maintenance, and that under this rule of law, which should govern this case, the undisputed facts show a violation of Section 1 of the Sherman Act. Even if a common purpose was required, the uncontroverted facts demonstrate abundantly the existence of such common purpose. The coercion of Milne Sales, of Plaintiff's customers, and of Kroner, were added to the Defendant's coercion of Plaintiff to secure adherence to Defendant's resale price policy. This added coercion was brought about by Defendant's actions which went beyond the announcement of a retail price policy and mere declination to sell. Such coercion was intended by Defendant to effect adherence to its resale price policy, and did accomplish this unlawful aim. In doing so, it flew in the teeth of the very prohibition the Supreme Court warned of in the **Parke, Davis** case.

The facts summarized above, show as a matter of law, a violation by Defendant of Section 1 of the Sherman Act. It has long been established that where there is no conflict in the evidence and the evidence is overwhelmingly one way, the trial court should direct a verdict. In the landmark case of **Thomsen v. Cayser** (1917), 243 U. S. 66, 37 S. Ct. 353, and in many other Supreme Court and Appellate cases down to the present to the same effect, it was held that the fact of a combination need not be submitted to a jury in a treble damage action, because where there is no conflict in the evidence, there is nothing for the jury to pass on. To the same effect see **Federal Savings & Loan Ins. Corp. v. Kearney Trust Co.** (C. A. 8, 1945), 151 F. 2d 720.

The Plaintiff asks for a new trial, pursuant to the entry of judgment n. o. v., on the question of the amount of damages. On this question the Plaintiff states that the Court erred in including in its charge to the jury, with respect to the amount of damages, the language, "less the reasonable value of the return Plaintiff would have made on the amount he received for the sale of his Route and less the reasonable value of the services of the Plaintiff and his wife necessary to the operation of the Route during the period of time future profits are calculated" in paragraph (4) on page 16 of said charge. The **Lessig** case shows that the instruction on loss of future profits should not have such a qualification.

: Alternative Motion for New Trial.

The Plaintiff moves the Court to grant a new trial on the issues of liability, fact of damage, and amount of damage, in the event the Court does not grant Plaintiff's motion for judgment n. o. v. on liability and the fact of damage and a new trial on the amount of damage.

In support thereof, Plaintiff states that the Court's charge to the jury was in error to the extent that it re-

quired a finding of "common purpose" as a necessary element to finding the fact of a violation of Section 1 of the Sherman Act, and that the Court erred in refusing to give Plaintiff's requested instructions, Nos. 25, 26 and 27 on the issue of combination. These instructions and the Plaintiff's position that common purpose is not a necessary element to an unlawful combination, are based on the **Parke, Davis** case.

In addition, Plaintiff states that the Court's charge to the jury was erroneous in those respects for which objections were made on the record on May 13, 1965, which are hereby incorporated herein by reference.

As a further grounds for his Motion for a New Trial, Plaintiff states that the questioning by the Court of the witness, John Darnton, and the answers elicited by the Court were prejudicial to Plaintiff and constituted reversible error.

In the event the Court grants a new trial pursuant to this Motion on the fact of liability and the fact of damage, the Plaintiff renews his request for a new trial on the amount of damage and incorporates in this Motion his allegation of error with respect to paragraph (4) on page 16 of the Court's charge to the jury.

Oral Argument requested.

Order.

(Filed in U. S. District Court June 15, 1965.)

This matter is pending on the motion of the plaintiff for judgment notwithstanding the verdict and alternatively for a new trial. The Court has been duly advised by briefs and oral arguments and is of the opinion that the verdict of the jury finding a judgment for the defendant should not be disturbed. Accordingly,

It Is Hereby Ordered that the motion of the plaintiff for a judgment notwithstanding the verdict and alternatively for a new trial be and the same is overruled.

Dated this 15th day of June, 1965.

/s/ JAMES H. MEREDITH,
United States District Judge.

Notice of Appeal.

(Filed in U. S. District Court June 24, 1965.)

Notice is hereby given that Lester J. Albrecht, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit, from the judgment entered in this action on May 13, 1965, on which a motion of the Plaintiff for a Judgment Notwithstanding the Verdict and Alternatively for a New Trial, was overruled on June 15, 1965.

Designation of Record on Appeal.

(Filed in U. S. District Court July 1, 1965.)

Comes now Plaintiff, hereinafter called Appellant, and, pursuant to the Rules of the United States Court of Appeals for the Eighth Judicial Circuit, designates the entire record and transcript of testimony as the record on appeal.

Memorandum for Clerk.

(Filed in U. S. District Court July 26, 1965.)

Plaintiff granted an extension of fifty (50) days to September 20, 1965, within which to file transcript of testimony and entire record as the record on appeal, and to docket the appeal.

Relevant Docket Entries in the District Court.

Date	Proceedings
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1964

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| Aug. 12 | Complaint, with request for jury trial, filed and summons issued. |
| Aug. 18 | Marshal's return to summons, etc, filed (Executed on 8-17-64). |
| Aug. 26 | Answer filed. |
| Sept. 30 | Set for trial on Jan. 4. |
| Oct. 3 | Plff's Notice of taking depositions of Walter I. Evans, et al, filed. |
| Dec. 10 | Motion of plff for leave to file a supplemental complaint, with Notice docketing motion for hearing on January motion docket, filed. Proposed supplemental complaint "lodged."
Plff's motion for summary judgment, with supporting memo., filed. Argument requested. |
| Dec. 14 | By consent and with leave, case removed from trial docket of Jan 4 and reset for March 1st. |

1965

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|---------|--|
| Jan. 4 | Depositions of G. Duncan Bauman; Geo. J. Kroner; Chas. B. Cleaver; Vernon Boyd and Walter I. Evans filed. |
| Jan. 8 | Plff's motion for leave to file a supplemental complaint and plff's separate motion for summary judgment passed for argument to Jan 15 at 10:30 A M. |
| Jan. 13 | Argument on plff's motions passed to January 22 at 10:30 A.M. |
| Jan. 15 | Separate affidavits of Walter I. Evans and G. Duncan Bauman in opposition to plff's motion for summary judgment, filed. |

- Jan. 21 Argument on plff's motions passed to February motion docket.
- Deft's brief in opposition to plff's motion for summary judgment filed.
- Feb. 5 Deposition of plff filed.
- Feb. 11 Deft's supplemental brief in opposition to plff's motion for summary judgment, filed.
- Feb. 12 Deft not opposing plff's motion for leave to file a supplemental complaint, the proposed supplemental complaint heretofore "lodged" is now filed.
- Plff's deposition exhibits filed.
- Plff's separate motion for summary judgment argued and submitted on briefs heretofore filed.
- Feb. 23 Order filed, for cause shown, vacating setting of March 1 and resetting case for trial on May 3. Copies of order mailed to Bartley, Siegel & Bartley and to Lon Hocker.
- Mar. 10 Plff's summary of his position on each point raised in opposition to plff's motion for summary judgment, filed.
- Deft's supplemental brief (in letter form). filed.
- Mar. 26 Order filed overruling motion of plff for summary judgment. Copies of order mailed to Bartley, Siegel & Bartley and to Lon Hocker.
- Apr. 7 Plff's interrogatories filed.
- Apr. 16 Deft's answers and objections to interrogatories and motion for protective order filed.
- Apr. 16 On application, plff granted leave to withdraw certain exhibits for a period of 7 days for the purpose of photostating.

- Apr. 21 Plff's request for argument on deft's objections to interrogatories and motion for protective order, on May motion docket, filed.
- Apr. 23 By agreement and with leave, deft's objections to interrogatories and motion for protective order, passed to further order.
- Apr. 23 Plffs. return exhibits withdrawn pursuant to court order of April 16.
- May 3 Passed for trial to May 5.
- May 4 Deposition of James McDowell filed. Stipulation dismissing Count One of complaint filed.
- May 5 Parties appear and announce ready for trial. Jury empaneled and sworn. Plff's evidence commenced.
- May 6 Jury trial resumed. Plff's evidence resumed. Further proceedings on trial postponed until Monday next at 10 A. M.
- May 10 Jury trial resumed. Plff's evidence resumed and concluded. Motion of deft for directed verdict in its favor at close of plff's case filed, submitted and the Court's ruling thereon reserved. Deft's evidence commenced and concluded. Motion of deft for directed verdict in its favor at close of all the evidence filed, submitted and Court's ruling thereon reserved. Motion of plff for directed verdict in his favor at close of all the evidence filed, submitted and Court's ruling thereon reserved. Further proceedings on trial postponed until Wednesday, May 12 at 10 A. M.
- May 11 Transcript of opening statement of counsel for deft filed by Official Court Reporter.
- May 12 Plff's motion to amend complaint filed, submitted and sustained.

- May 13 Jury trial resumed. After arguments of counsel and charge by the Court, the jury retires to consider its verdict, which verdict it afterwards returns into Court finding issues in favor of deft. and against plff. Verdict filed. Judgment filed and entered accordingly. Copies of judgment mailed to Gray L Dorsey; Donald S. Siegel and Lon Hocker.
- May 21 Plff's alternative motion for judgment n.o.v. or for new trial, filed. Argument requested. Memo in support of motion filed.
- June 11 Plff's motion for judgment notwithstanding the verdict, and alternatively, for a new trial, argued and submitted.
- June 15 Order filed overruling motion of plff for judgment notwithstanding the verdict and alternatively for a new trial. Copies of order mailed to Bartley, Siegel & Bartley and to Lon Hocker.
- June 24 Plff's Notice of Appeal from Judgment of May 13, 1965 filed and copy of Notice mailed by Clerk to Lon O Hocker, atty for deft-appellee. Cost bond on appeal filed.
- July 1 Plff's designation of record on appeal filed.
- July 13 Plff's cost bond on appeal in the sum of \$250. filed.
- July 26 Plff granted extension of 50 days to September 20 within which to file and docket transcript of testimony and entire record on appeal.
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[fol. 143]

SUPPLEMENTAL RECORD—Filed January 28, 1966

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,161

Civil

LESTER J. ALBRECHT, Appellant,

vs.

THE HERALD COMPANY, a corporation, d/b/a GLOBE-
DEMOCRAT PUBLISHING COMPANY, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[File endorsement omitted]

[fol. 144] The following, taken from pages 294 and 295 of the Transcript of the Record, occurred immediately after the colloquy recorded on page 110 of the Appellant's Record:

"The Court: The Motion for Directed Verdict is also amended in accordance with the Complaint.

"Mr. Hocker: Your Honor, of course I object to the Motion and the claim and the relief prayed for because, number one, it does not conform to the proof, as there is no evidence of any combination involving plaintiff's customers, none whatever. And there is no evidence of any combination for the purpose stated with Milne Sales, and there is no evidence of any

damage by reason of any combination with George Kroner.

"I also object to the amendment since the amendment makes the claim in Count II unintelligible. It provides that lines 2, 5 and 6 of paragraph 19, which we take it is the basis of this claim, since it is the only paragraph that mentions the Sherman Act and—

"The Court: Line what, now?

"Mr. Hocker: Lines 2, 5 and 6 of the paragraph on page 5. This makes the paragraph unintelligible and makes the petition not state a claim.

"The Court: Lines 2, 5 and 6 of paragraph 19 on page 5.

"Mr. Hocker: The copy of the Motion I have says, 'In order to conform to the evidence.'

"Mr. Siegel: It should have been 1, 5 and 6.

"Mr. Hocker: Wait a minute. Maybe I misunderstand what you are saying. You are not deleting these lines?

"Mr. Siegel: No, no.

[fol. 145] "Mr. Hocker: The only thing you are deleting then is the words, 'Person or persons unknown to plaintiff', wherever they appear?

"Mr. Siegel: And substituting in lieu thereof 'plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner'.

"Mr. Hocker: What are you going to do with the words, 'contract, agreement or understanding' that appear in paragraph 18 and 19? Are they deleted or left in?

"Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

[fol. 146] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 147]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,161

LESTER J. ALBRECHT, Appellant,

v.

THE HERALD COMPANY, a corporation, d/b/a GLOBE-
DEMOCRAT PUBLISHING COMPANY, Appellee.

Appeal from the United States District Court for the
Eastern District of Missouri.

OPINION—October 20, 1966

Before Matthes, Mehaffy and Gibson, Circuit Judges.

MEHAFFY, Circuit Judge.

This is a treble damage action under § 4 of the Clayton Act, 15 U.S.C.A. § 15, for violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1.

Lester J. Albrecht (hereafter plaintiff) appeals from a judgment entered pursuant to a jury verdict finding for The Herald Company, a corporation, d/b/a Globe-Democrat Publishing Company, defendant-appellee (hereafter Globe-Democrat). We affirm.

For many years the Globe-Democrat has been a morning newspaper in St. Louis, Missouri, delivered to home customers of the St. Louis and other areas through a [fol. 148] system of 172 routes. Globe-Democrat carriers are entrepreneurs, purchasing their papers at wholesale and selling them at retail. Plaintiff owned and operated Route 99 in the City of Kirkwood, St. Louis County, said route consisting of some 1200 customers.

Globe-Democrat advertised in its newspaper a suggested retail price. Each carrier had an exclusive territory but

was subject to termination *inter alia* for charging more than the suggested retail price. In case of termination, the carrier was given sixty days to provide a satisfactory purchaser for his route. Plaintiff had knowledge of Globe-Democrat's written price policy.¹

Plaintiff adhered to the suggested retail price for several years but started overcharging in 1961. He admittedly received calls from Globe-Democrat about reported overcharging in 1961 and 1962. Finally, on May 20, 1964 Globe-Democrat wrote plaintiff as follows:

"The Globe-Democrat Publishing Company has received and referred to you a large number of complaints from customers in the territory you are servicing as a carrier that you are charging subscribers more than the publisher's suggested retail price.

"The system we customarily follow of respecting as exclusive territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of overpricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves or for resale by another carrier at the lower prices in the over-priced territory.

[fol. 149] "In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter."

The enclosed letter advised the residents of the territory that some subscribers were being overcharged and that the Globe-Democrat would deliver the paper at the sug-

¹ "The right of each carrier whose appointment is effective to sell the St. Louis Globe-Democrat by home delivery in his territory, will be maintained exclusively to him under the terms of his appointment so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher for such sales in the City or County in which such territory is located."

gested retail rate.² These letters evidenced Globe-Democrat's decision to compete and provide its readers with the paper at the suggested rate. In addition, Globe-Democrat directed the Milne Circulation Sales Corporation, a national firm with a St. Louis office, whose business it was to procure readers for newspapers throughout the country; to engage in telephone and house-to-house solicitation to all the residents of the area in Route 99.³ The customers thus procured—some new—some who had quit because of plaintiff's overcharge—some who changed to take advantage of the lower price—were furnished home delivery of the paper by Globe-Democrat personnel. This campaign resulted in a customer list of 314 by July 7, 1964. Globe-Democrat did not want to engage in the carrier business, and in July of 1964 advertised the new route as available without cost. George John Kroner took over the route. Kroner, a route carrier in another neighborhood, knew the Globe-Democrat would not tolerate overcharging. He knew why the route was given to him without charge and [fol. 150] understood that he might have to return it to Globe-Democrat if plaintiff sold his route or discontinued his overcharging practice.

² "It has come to our attention that some Kirkwood area readers of the Globe-Democrat who subscribe to our paper through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price. The suggested retail rate for the Globe-Democrat for delivery by carrier is \$1.60 per month for the daily paper, plus 20 cents for each issue of our weekend paper. In addition, the premium on reader insurance is 10 cents per week, if desired.

"If you are being charged more for the paper than our suggested retail rate, please advise us of this condition on the enclosed form and we will deliver the paper to you at the suggested retail rate.

"If you are not a regular reader of our paper, we know that you will find the Globe-Democrat stimulating, informative and exciting. Please fill in the enclosed form and we will start service at once."

³ Milne worked exclusively for the Globe-Democrat in the St. Louis area.

During this period and thereafter, Globe-Democrat continued to sell its papers to plaintiff and plaintiff continued to serve his customers. On June 1, 1964, Globe-Democrat again objected to plaintiff about overcharging and warned plaintiff that legal steps would be taken if necessary. Following this warning, a conference between plaintiff and Globe-Democrat took place. Plaintiff was told that he could charge any price he wanted, but unless the Globe-Democrat's policy was followed, the Globe-Democrat did not have to do business with him. Plaintiff continued his practice of overcharging.

On or about July 27, 1964, a representative of Globe-Democrat told plaintiff that the Globe-Democrat was not interested in being in the carrier business and would be happy if plaintiff would take the customers back so long as he charged the suggested retail price. Plaintiff made no commitment but left the meeting and made an appointment with his attorney to bring this lawsuit. On August 21, 1964, after institution of the suit, Globe-Democrat notified plaintiff of termination of his appointment as a Globe-Democrat carrier:

"We have received a copy of the Complaint which you have filed in the U. S. District Court asking damages from us in the amount of three hundred forty thousand dollars.

"It seems apparent that the prosecution of this action is clearly inimical to the purpose for which your appointment as carrier was made and you are hereby notified that your appointment as carrier is terminated.

"However, in accordance with our statement of policy, we will nevertheless give you the opportunity [fol. 151] of producing a substitute whose credit, experience and efficiency is satisfactory to us, and we will not object to his appointment on the ground that he may be paying you in connection therewith. Under the circumstances, with the lawsuit pending, we believe that sixty days is a reasonable time for this purpose.

"Accordingly, we shall cease selling you newspapers on October 21st, 1964. In the meantime, we will be ready to interview any substitute you may wish to produce."

Thereafter, Globe-Democrat granted plaintiff an extension of nine days to consummate the sale of his route. He sold the route for \$12,000.00, \$1,000.00 more than he had paid for it, but less than he could have gotten if Globe-Democrat had returned Kroner's 300 odd customers then comprising Route 198. Despite the competition, plaintiff retained some 900 of his original 1200 customers.

This case went to the jury, which considered the sole question whether § 1 of the Sherman Act was violated by reason of a "combination" between the Globe-Democrat and plaintiff's customers or with Milne or Kroner. This was plaintiff's theory under his amended complaint. The original complaint was in two counts, the first of which plaintiff dismissed before trial. During trial plaintiff amended Count II, eliminating the charges of conspiracy and agreements and charging a "combination" between the Globe-Democrat and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."⁴ [fol. 152] In charging the jury, the District Court used as its principal guide the teachings of *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).⁵

⁴ "Plaintiff by its motion to amend the Complaint now desires to eliminate from the consideration of the jury any reference to a conspiracy under Section 1 of the Sherman Act or an illegal agreement under Section 1 of the Sherman Act, and desires that the case be submitted to the jury solely on the question of a combination under Section 1 of the Sherman Act.

"Is that correct, gentlemen?

"Mr. Siegel: Yes.

"Mr. Dorsey: Yes. Thank you.

"The Court: Very well."

⁵ "The only ground of liability submitted to you, therefore, is the question of whether the defendant combined with some other person or persons to violate Section 1 of Title 15 U.S.C.A., providing

[fol. 153] Restraint of trade embraces only acts, contracts, agreements or combinations which restrict competition or unduly obstruct due course of trade, thereby operating to the prejudice of the public. The Supreme Court said in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940):

'Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal. . . .'

"The effect of this act is to forbid combinations of traders to suppress competition, as competition, not combination, should be the law of trade.

"A combination is a concerted course of action between the defendant and one or more persons. This may be with an agreement either expressed or implied or it may be without an agreement. In order to have a combination there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means. The purpose of the combination must be the applying of coercion in some manner which unduly hinders or obstructs the free and natural flow of commerce in interstate trade.

"A seller has the right under the law to announce a resale price policy and decline to sell to those persons who fail to refuse to adhere to this policy. Such action is not an unlawful combination in violation of the Sherman Act.

"A seller may not announce a suggested resale price and thereafter enter into a combination with another person or persons, which goes beyond the mere refusal to sell and applies coercive action to enforce or obtain adherence to the suggested resale price. This is an unlawful combination prohibited by the Sherman Act.

"This is true whether the suggested price is a minimum price of (sic) a maximum price.

"Nothing in the Sherman Act requires that a seller of a product must grant to a customer the exclusive right to resell the product in a given territory, and for this reason it is not a violation of the act for the seller of a product either to complete (sic) in good faith with his own customer in a given territory or to permit any other customer to compete with him in that territory. Indeed, it is not a violation of the act for the seller of a product to announce, so long as he neither conspires or combines with another person for this purpose, that he will refuse to sell to any customer who does not, in turn, resell at the suggested resale price or to make adherence to the suggested price a condition to the maintenance of the exclusive right to sell in a particular territory, nor to

"The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . . ."

terminate commercial relationships with a customer who does not adhere to the suggested retail price; nor is it a violation of the Act to refuse to deal with someone solely because he has brought a lawsuit against his supplier.

"The gist of the right of action claimed by the plaintiff under this Act is that the defendant combined with some other person in a combination designed to coerce the plaintiff to maintain adherence to the suggested retail price.

"To engage in 'competition' means to take actions which are calculated to acquire the business or customers of others in the sale of a product or commodity where the effort to gain that business or customers is made in 'good faith.' Good faith in this connection means for the purpose of engaging in the sale of that commodity or product, and getting customers for oneself, and not for the sole purpose of inflicting injury upon another by taking his customers away from him. Evidence showing good faith or bad faith is: whether or not the actor remains in that business after he has accomplished the injury; whether or not his acts and statements indicate that he is, in fact, intending to engage in that line of business or commerce for his own benefit and profit. Actions calculated to acquire customers or patronage, but not done in good faith, as indicated by the enumerated criteria, are, in fact, not competition.

"If you find that a combination was entered into between the defendant and Milne Circulation Sales, Inc., and/or George Kroner and/or the plaintiff's customers, and pursuant to such combination the defendant or George Kroner or Milne Circulation Sales, Inc., solicited the plaintiff's customers for the purpose of coercing the plaintiff to follow the defendant's suggested retail price, then you shall find that the defendant violated the antitrust laws.

"If you find an unlawful combination was formed and that the defendant pursuant to such combination terminated the working relationship between itself and the plaintiff to coerce the plaintiff to follow the defendant's suggested retail price, or terminated because plaintiff refused to comply with the defendant's suggested retail price, then this constitutes a violation of the antitrust laws,

and in *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4 (1958): "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." See also *United States v. American Linseed Oil Co.*, 262 U.S. 371, 388-89 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 400 (1921); *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. [fol. 154] 600, 610 (1914); *Kansas City Star Co. v. United States*, 240 F.2d 643, 658 (8th Cir. 1957), cert. den., 354 U.S. 923 (1957); *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519, 521 (10th Cir. 1950).

Globe-Democrat's activity here did not hinder, but fostered and actually created competition to the benefit of the public. To have condoned plaintiff's overcharging would have been a signal to all carriers, each monopolistic in his own right, to mulct the public for all the traffic would bear.

If Globe-Democrat's activities constitute a violation of the antitrust laws, it has only one alternative, and that is to terminate all home delivery carriers by the simple declination to sell. Globe-Democrat could then make the home deliveries by its own employees. It would thus automatically become a monopolist itself and wreak such havoc as Mr. Justice Douglas decried in his opinion in *Standard Oil Co. v. United States*, 337 U.S. 293, 318-319 (1949):

"But beyond all that there is the effect on the community when independents are swallowed up by the

even if the right to compete or to terminate was reserved to the defendant in a statement of policy.

"If you find that no combination has been proved, then your verdict should be for the defendant; even if you find that a combination existed then before you may find for the plaintiff, you must find that damage resulting to the defendant was the result of this combination. In other words, if you find that the damage done to the plaintiff, if any, was caused not by the combination, then even though you find that such combination did exist, your verdict will be in favor of the defendant."

trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one."

The routes are valuable property rights owned by the 173 carriers. Carriers were dealt with fairly as shown by the evidence of profit ensuing and sale price of the routes. There is no suggestion in the record to the contrary. Moreover, it was Globe-Democrat and not the carriers which constantly sought additional customers to carriers' benefit through the exclusive employment of Milne Circulation Sales, Inc. for that purpose. Thus, if Globe-Democrat resorted to its only alternative, the cure would be worse than the disease. Globe-Democrat by becoming a monopolist would not benefit the public one whit. The facts in this case demonstrate, without question we think, no evil at which the Sherman Act struck. Furthermore, pursuing the alternative would destroy valuable property rights, and one of the purposes of Sherman was to preserve and protect property rights. The Supreme Court said in the first *Standard Oil* case, 221 U.S. 1, at 78 (1911), "... one of the fundamental purposes of the statute is to protect, not destroy, rights of property."

The principal issue is whether the record evidence compels, as a matter of law, a conclusion that Globe-Democrat participated in an unlawful combination in restraint of trade.

Home delivery of newspapers, for longer than anyone can remember, has been conducted by a system of exclusive routes. Practicality dictates this as a morning newspaper must be delivered to the homes of readers throughout the city by a certain time. When one of the witnesses was asked how long such a method of distribution had been used by Globe-Democrat, he answered "forever." Other

than payment of bills and timely delivery of the paper in good condition, the only requirement of Globe-Democrat carriers was that the public not be overcharged. Obviously, this policy was adopted to comply with the antitrust laws by insuring competition necessary for the protection of the public. Home delivery by the route system is monopolistic, whether done through independent merchants such as plaintiff, or done by the publisher. The public's protection from the harmful effects therefrom can be guaranteed only by preventing overcharging through insuring competition.

Combination is usually defined as the union or association of two or more persons for the attainment of some common end.⁶ Globe-Democrat did not combine with anyone. Its action taken to provide competition to plaintiff was completely unilateral. When customers started complaining and some discontinuing their subscriptions, Globe-Democrat warned plaintiff. When Globe-Democrat's repeated warnings were ignored, it offered plaintiff's dissatisfied customers its product at its announced price. It did this first by letter followed by telephone and door-to-door campaign. It delivered the customers thus obtained by its own employees. Globe-Democrat acted only through its employees and agents. All the while, it continued to sell papers at wholesale to plaintiff. Thus, it became a carrier itself in competition with plaintiff. Once Route 198 was established by Globe-Democrat, competition was *fait accompli*. It was only thereafter that the new route was given to Kroner. Even after this, Globe-Democrat attempted to persuade plaintiff to desist from overcharging. Plaintiff, however, filed this suit, which led to his termination as a carrier. Globe-Democrat had a legal right to terminate plaintiff for filing the lawsuit.⁷ It had the right

⁶ Joyce on Monopolies #1; Thornton Combinations in Restraint of Trade, ¶141, p. 96; Webster's Third New International Dictionary; Black's Law Dictionary, 4th Ed.

⁷ Plaintiff continued to service his route until consummation of its sale but in the interim desisted from overcharging.

to decline to sell papers to him for good cause, no cause, or any cause except in conjunction with a scheme to violate the antitrust laws. *United States v. Parke, Davis & Co.*, *supra*; *United States v. Colgate & Co.*, 250 U.S. 300 (1949); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2nd Cir. 1962).

[fol. 157] Ordinarily, the existence of restraint of trade is a question of fact for the jury's determination.⁸ Plaintiff insists, however, that, as in *Parke, Davis & Co.*, the question here is one of law and not of fact. If that be the case, our conclusion would be the same, as we are convinced that plaintiff failed to establish a Sherman Act violation.

Plaintiff argues that this case is controlled by *Parke, Davis* and the "per se" cases such as *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Neither *Parke, Davis* nor any of the "per se" cases are apposite in fact to the case at bar. Aside from the fact that plaintiff here eliminated any charge of conspiracy or agreement; that no combination whatsoever existed; and there was no coercion other than providing legal competition, the record evidence reveals many obvious distinctions from any of the reported cases relied upon by plaintiff.⁹

As examples, none of the cited cases involves a business whose product must be delivered daily at a certain time by a monopolistic delivery man; and in none does the sales

⁸ In *Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co.*, 339 F.2d 277, 280 (6th Cir. 1964), the court stated, "Whether a restraint is unreasonable or whether there is any restraint is a question of fact. (Citations omitted.)" Compare *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951).

⁹ Not cited is the case most closely akin: *John J. and Warren H. Graham v. Triangle Publications, Inc.*, 233 F.Supp. 825 (E.D. Penn. 1964). The court there held that the newspaper's resale price policy was maintained and enforced within the permissible bounds of *Colgate* and *Parke, Davis*. On appeal, the Third Circuit by per curiam opinion (344 F.2d 775 (1965)) refrained from passing on the legal issues in holding only that the District Court did not abuse its discretion in refusing to award a preliminary injunction.

price of the product to the consumer represent only a fraction of the cost of the product.¹⁰ In none is the only [fel. 158] alternative a monopoly leaving unprotected the public interest. In none did the only alternative result in destruction of valuable property rights which the Sherman Act seeks to protect. In none did the producer continue to sell to the distributor on the same terms, but also provide the public with the alternative to purchase the product at a lower price.

Plaintiff's reliance on *Parke, Davis* is misplaced. The Court there found an illegal combination violative of the Sherman Act:

"In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." *Supra* at 45.

Contrarily, in the instant case Globe-Democrat's activities were unilateral and no combination was formed. At this juncture, Globe-Democrat had not gone so far as to decline to sell—it continued to sell to plaintiff at the same price. After competition was established, plaintiff retained some 900 of his original 1201 customers. Only later when plaintiff brought suit was he terminated. Even then the Globe-Democrat continued to sell him until he sold the route.

Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951), furnishes plaintiff with his strongest "per se" argument. *Kiefer-Stewart* is inapposite as in that case an

¹⁰ The principal income of a newspaper is derived from its advertising. Its advertising rates are based on its circulation which is the lifeblood of a newspaper and accounts for utilization of such agencies as Milne here in a constant effort to increase circulation. For statistics on advertising revenue, see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

agreement existed among competitors to fix a maximum resale price, thus forming an illegal combination. In *Kiefer*, there was no route system necessary, no timely home delivery required, and no natural monopoly involved whether done by the producer or distributor.

[fol. 159] We will not unduly burden this opinion by demonstrating distinctions between this and other cases, but it can safely be said that commencing with the first case under the Act, *United States v. Knight*, 156 U.S. 1 (1895), and continuing through *United States v. General Motors*, 384 U.S. 127 (1966), all reported cases are readily distinguishable from the case at bar.

The Supreme Court in *United States v. Hutcheson*, 312 U.S. 219, 230 (1941), said, "by the generality of its terms, the Sherman law has necessarily compelled the courts to work out its meaning from case to case." It is because of the generality of the terms of the Act coupled with the complexity of modern business that such rules as *Parke*, *Davis* and the "per se" became necessary for the public's protection. The basic purpose—the ratio decidendi—of the Sherman Act was protection of the public interest and preservation of freedom of competition. We, therefore, cannot construe the Sherman Act to compel Globe-Democrat to pursue a course which would restrict competition to the prejudice of the public interests.

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." In *Re Chapman, Petitioner*, 166 U.S. 661, 667 (1897); *Lau Ow Baw v. United States*, 144 U.S. 47, 59 (1892); *State of Maryland v. United States*, 165 F.2d 869, 872 (4th Cir. 1947).

The rule of reason conceived in the original *Standard Oil* case, *supra*, is but a rule of common sense and must be applied to the instant case if the public is to be protected.

Those familiar with the historical background of the Sherman Act will recognize that none of Globe-Democrat's [fol. 160] actions resembles the evils that led to the enact-

ment of the statute. It must be conceded that the Globe-Democrat could have declined to do business with plaintiff and deliver the papers itself or through another with impunity. Globe-Democrat did not go this far and should not be penalized for its plan to protect the public against overcharging. Neither should plaintiff be rewarded for his avarice. A common sense consideration of the record evidence compels the conclusion that Globe-Democrat's action in providing competition did not remotely restrain trade, but, contrarily, fostered competition, and, therefore, our conclusion is consistent with the Sherman Act and the teachings of the Supreme Court.

As a subsidiary issue, plaintiff contends the court erred in instructing the jury that in order to have a combination, there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means. This was the plaintiff's theory of the case and the only basis for recovery alleged in his complaint as amended. It was the theory upon which the case was tried and upon which plaintiff's counsel argued to the jury.¹¹ It is too late after conclusion of the evidence for plaintiff to shift theories. *Cf. Armstrong Cork Co. v. Lyons*, F.2d (8th Cir. Sept. 21, 1966), and cases there cited, *Whiteside v. W. T. Bailey Lumber Co.*, 274 F. 96 (8th Cir. 1921) and *Bracken v. Union Pac. R. Co.*, 75 F. 347 (8th Cir. 1896). In any event, [fol. 161] this assignment of error, as well as the others relating to the court's refusal to give certain proffered

¹¹ Counsel's statement to jury:

"The issue involved in this case is a relatively simple one. We have tried to eliminate from the Complaint those matters which we thought might be confusing and somewhat repetitious or redundant in the way of claims in this matter; so that this case is now boiled down to the simple, single issue, so far as liability is concerned, as to whether or not the defendant entered into an unlawful combination with Milne or Kroner or plaintiff's customers is an effort to try to obtain adherence to the defendant's suggested retail price."

instructions, is of no consequence by reason of our conclusion that the undisputed evidence fails to show a Sherman Act violation.

The judgment is affirmed.

[fol. 162]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 18,161—September Term, 1966

LESTER J. ALBRECHT, Appellant,

vs.

THE HERALD COMPANY, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

JUDGMENT—October 20, 1966

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

[fol. 163]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,161—September Term, 1966

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE. PENDING PROCEEDINGS
IN SUPREME COURT OF THE UNITED STATES—November
7, 1966

On Consideration of the motion of the appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 164] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 165]

SUPREME COURT OF THE UNITED STATES

No. 975—October Term, 1966

LESTER J. ALBRECHT, Petitioner,

v.

THE HERALD COMPANY, ETC.

ORDER ALLOWING CERTIORARI—February 27, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED

JAN 14 1967

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966

No. ~~92~~ 43

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the
Eighth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No.

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the
Eighth Circuit.**

Petitioner (R. 1) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on October 20, 1966.

OPINIONS BELOW.

The District Court entered judgment without an opinion on May 13, 1965 (R. 131-132). The opinion of the Court of Appeals for the Eighth Circuit, not yet published, is reprinted *infra*, App. A.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 20, 1966 (*infra*, App. A, p. 17). The jurisdiction of this Court rests on 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent-merchant carriers in order to induce him to comply with its suggested resale price and then terminating sales to him for his continued refusal to agree to comply are in violation of Section 1 of the Sherman Act.

STATUTES INVOLVED.

Section 1 of the Sherman Act (26 Stat. 209; 50 Stat. 693; 69 Stat. 282; 15 U. S. C., Sec. 1), provides that:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . .”

Section 4 of the Clayton Act (38 Stat. 731; 15 U. S. C., Sec. 15), provides that:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.”

STATEMENT.

Petitioner was, from June 1, 1956, to October 31, 1964, the home delivery carrier of the St. Louis Globe-Democrat newspaper on Route 99 in a suburban area comprising part of Kirkwood, Missouri (R. 1, 23, 48-49). He bought Route 99 from the previous carrier and sold to another that part of the Route remaining to him after the incidents involved in this suit (R. 22, 50-52).

Respondent is a corporation which publishes the St. Louis **Globe-Democrat**, a morning newspaper circulated in Illinois and Missouri by mail and by home delivery routes (R. 1-2, 82-83). Until 1961, the relationship between the newspaper and its home delivery carriers was regulated by a collective bargaining agreement (R. 53-54). On February 16 and 17, 1961, the Business Agent of St. Louis Newspaper Carriers' Union No. 450, wrote G. D. Bauman, Business Manager of the newspaper, advising him that the carrier contract would terminate May 26, 1961, and inviting negotiations for a new contract. On May 16, 1961, Mr. Bauman replied that on advice of counsel the newspaper took the position that home delivery carriers are not employees but independent merchants; that it could not negotiate with the carriers about the pricing policy, which must be determined unilaterally by it; that a threatened strike by the carriers would be considered by the newspaper to be a boycott by a group of merchants and that redress would be sought by actions for treble damages under State and Federal antitrust laws (R. 53-55).

On May 26, 1961, the contract between the newspaper and the carriers' union expired and was not renewed (R. 54, 58).

In Mr. Bauman's letter of May 16, 1961, to the Business Agent of the carriers, and in a policy statement issued to

all carriers and received by Petitioner, the newspaper stated that it would announce a suggested retail price to subscribers and if a carrier charged more it would refuse to sell newspapers to him, or would terminate his exclusive right to sell "the Globe-Democrat by home delivery in his territory," but he would be given 60 days within which to sell his route to a satisfactory carrier (R. 54, 60). The suggested retail price was published daily in an ad in the paper (R. 29-30).

Beginning in 1961, the newspaper increased its suggested retail price per month for home delivery of the daily paper from \$1.30 to \$1.60, and continued the \$1.60 suggested price at all subsequent times. Petitioner charged his customers on home delivery Route 99 the suggested \$1.60 price if they paid in advance, but otherwise, he charged \$1.70 (R. 32, 33). He had few customers who paid in advance (R. 33).

In 1961, and again early in 1962, Walter I. Evans, the Circulation Director of the newspaper, telephoned Petitioner, saying that he had information that Petitioner was charging \$1.70 rather than the suggested \$1.60, and warning him that the newspaper could not tolerate that, and Petitioner would have to charge the suggested price (R. 34, 35). Petitioner replied that he was an independent merchant, received no pension or vacation payments from the newspaper as an employee would; and that he would set his own price (R. 34).

On June 1, 1962, Mr. Evans wrote Petitioner protesting his \$1.70 price, and warning that if he persisted, "we will take whatever legal steps appear to be necessary to effectuate our position" (R. 35). Following receipt of that letter, Petitioner had a meeting with Circulation Director Evans and Business Manager Bauman in Evans's office, at which he was told that the newspaper would have to control the retail price; that they could not tell Petitioner

what to charge, but if he charged more than the suggested retail price, they did not have to do business with him; and that Petitioner should not use a "bill" which had a price of \$1.70 printed on it (R. 36-37). Petitioner continued to charge \$1.70 for the daily paper (R. 38).

The Globe-Democrat was delivered to homes on 165 to 173 routes (R. 83-84). Throughout the period from May 26, 1961, when the Union contract expired, to May 20, 1964, the newspaper took no action against any of the home delivery carriers to secure compliance with its suggested retail price, except to contact carriers whose subscribers had called attention to the fact that they were charging more than the suggested price and requesting them to comply (R. 87). Over the three-year period prior to May 20, 1964, Petitioner lost about half a dozen subscribers as a result of charging \$1.70 instead of the publisher's suggested \$1.60 (R. 38). On May 20, 1964, Petitioner had 1,201 daily subscribers (R. 38).

On May 20, 1964, the newspaper sent Petitioner a letter, signed by Circulation Director Evans and composed with the assistance of Business Manager Bauman (R. 8, 97). The letter informed Petitioner that the newspaper had received and referred to him "a large number of complaints" from his customers that he was charging more than the publisher's suggested price, and continued:

"The system we customarily follow of respecting, as exclusive, territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of over-pricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves, or for resale by another carrier, at the lower prices in the over-priced territory.

"In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter" (R. 8).

The policy statement referred to was first issued in 1959 with reference to independent news dealers. Bauman's letter of May 16, 1961, stated that it also applied to carriers. On May 24, 1962, it was reissued and made specifically applicable to home delivery carriers (R. 55-60). The territories were exclusive only as to other home delivery carriers. Petitioner, as well as other carriers, had competition within his route from store sales, street racks, and street corner salesmen, who also made some home deliveries (R. 26-27, 52, 72, 82).

The enclosed letter informed addressees that readers who subscribe "through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price." It further stated the amount of the suggested price, and invited completion and return of an enclosed card which would authorize the Globe-Democrat to make delivery at the suggested price. The letter was signed by Circulation Director Evans (R. 9, 10).

The letters were mailed out to the residents on Petitioner's route, and were followed by telephone and door-to-door solicitation by Milne Circulation Sales Corporation, under contract with the newspaper (R. 41-43, 61-70). This solicitation asked persons paying "the extra price" if they wanted to "get the paper at the regular price" (R. 66). Milne had done circulation solicitation for the Globe-Democrat for 4 or 5 years, but had never based such solicitation on an inquiry as to the carrier's compliance with suggested retail price (R. 66). The Globe-Democrat had never taken this kind of action against any other carrier (R. 87). It had no dissatisfaction of any kind with Petitioner's performance of his services as a

home delivery carrier, except his pricing (R. 88-89, 95-96). Business Manager Bauman said that he wished other carriers would perform their work as well as Petitioner (R. 96). The only reason for soliciting the customers of Petitioner by the described means was admitted by Evans to be to maintain the publisher's suggested retail price (R. 88).

The result of the solicitations was subjection of Petitioner to angry epithets, opprobrium and serious loss of income, with little decrease in expenses (R. 41-42). He lost more than 300 of his 1,201 daily customers (R. 41, 44-47). On June 12, 1964, nineteen days after the solicitations began, Petitioner lowered his price from \$1.70 to the suggested retail price of \$1.60, in order to keep his remaining customers (R. 45-46, 49).

The newspaper used makeshift means to make deliveries to the customers it had solicited away from Petitioner. It owned no equipment for home deliveries, and had no employees for this purpose (R. 84-87). It had not been in the carrier business; did not want to be in it and had no thought of making a profit from delivering to Petitioner's former customers (R. 84, 96-97). Temporarily, employees with other duties made the deliveries, using their personal cars (R. 91). Early in July, the newspaper advertised for a carrier to deliver to the customers it had taken away from Petitioner (R. 75). John Kroner, a carrier on another Globe-Democrat route, applied for and was given the list of former customers of Petitioner on his Route 99, which was designated a new Route, with the number "198", although the newspaper had not more than 173 routes (R. 71-76, 83-84, 99-100). The right to serve these 300 customers was given to Kroner without charge (R. 72-73, 92, 99). Circulation Manager Charles B. Cleaver stated that he told Kroner he could have the profit of serving these customers; that it was uncertain how long he could deliver to them, that these customers had been

taken from Albrecht for overcharging; and that he reminded Kroner of the newspaper's resale price policy (R. 99-101). Kroner testified he was told that he might have to give back the customers if Petitioner Albrecht sold "the route," or if "Albrecht got straightened out with the Globe-Democrat" (R. 76-77).

On July 27, 1966, Petitioner met with Business Manager Bauman, in his office. Bauman said the customers would be given back to Petitioner if he would agree to charge no more than the suggested retail price (R. 47, 96). Petitioner refused; saw his attorney, and this action was filed August 12, 1964 (R. 1, 47). On August 21, 1964, in a letter signed by Evans, the newspaper notified Petitioner "that your appointment as carrier is terminated," but he would be given 60 days to sell his route to a person whose credit, experience and efficiency was acceptable to it (R. 48-49). This period was subsequently extended from October 21 to October 31, to simplify billing, which is usually on a monthly basis (R. 49).

Eugene Schwarzenbach offered Petitioner \$24,000.00 for Route 99 (R. 50). On September 15, 1964, Schwarzenbach and Albrecht met with Evans, Cleaver and Bauman to see if the publisher would approve the prospective purchaser. Bauman told Schwarzenbach that he would not be buying the 300 subscribers on Route 99 turned over to Kroner as "Route 198," and that new subscriptions 'phoned in to the newspaper would be given to Kroner on "Route 198," unless Petitioner dropped the suit and bought back the customers from Kroner—in which case Petitioner could sell to Schwarzenbach or could operate it himself if he would agree to charge the suggested retail price (R. 50-51). After this meeting, Schwarzenbach agreed to purchase Petitioner's part of Route 99 for \$12,000.00 (R. 51-52, Plaintiff's Exhibit 12, *infra*, App. B). On December 1, 1964, Schwarzenbach bought the "Route 198" customers from Kroner for \$3,600.00 (R. 80).

This case was filed August 12, 1964, in the United States District Court of the Eastern District of Missouri, Eastern Division, Meredith J. Jurisdiction was based on diversity and on the antitrust laws (28 U. S. C., Sec. 1332; 15 U. S. C., Sec. 15). Count I charged tortious interference with business relations and prayed judgment for loss of profits and for punitive damages. Count II charged violation of Sections 1 and 2 of the Sherman Act (15 U. S. C., Sections 1, 2), and prayed treble damages for loss of profits (R. 1-7). Supplemental complaint alleged continued acts of unlawful resale price maintenance and unlawful termination and prayed judgment for loss on sale price and loss of future profits (R. 12-13).

On December 10, 1964, Petitioner-Plaintiff moved for summary judgment, on the ground that the facts as stated above were set out in pleadings, exhibits or depositions of Globe-Democrat employees and were uncontroverted (R. 13-19). The Court was of the opinion that there were material facts in dispute and the motion was overruled on March 26, 1965 (R. 19). On May 4, 1965, by stipulation, Petitioner-Plaintiff dismissed Count I (R. 20, 141). Trial was had before the Court and a jury on May 5 and 6, 1965, postponed to May 10, 1965, and postponed again to May 13, 1965 (R. 141-142). The facts as presented by Petitioner-Plaintiff were not controverted. Respondent-Defendant's evidence consisted of the Union contract between the Globe-Democrat, the afternoon St. Louis paper (Post-Dispatch), and the Carriers' Union; Mr. Bauman's letter to Mr. Halls of May 16, 1961, concerning the termination of that contract; the News Dealers' policy statement of August 19, 1959; and the Respondent-Defendant's Carriers' policy statement of May 24, 1962 (R. 102).

Respondent-Defendant had moved for a directed verdict at the close of the Plaintiff's case. Ruling was reserved (R. 101). At the close of all the evidence, Plaintiff moved

for a directed verdict, on the ground that as a matter of law the facts showed a violation of Section 1 of the Sherman Act, both in the acts of interference and in the termination (R. 103-109). The Court reserved ruling on this motion, also (R. 109).

Petitioner-Plaintiff objected in chambers, on May 12, 1965, to those parts of the Court's proposed instructions that would require the jury to find a "common purpose" between the Globe-Democrat and some other person or persons in order to find a violation of Section 1 of the Sherman Act, and objected to the Court's refusal to give Plaintiff's Requested Instructions Numbers 25, 26 and 27, which would permit finding a violation if the facts showed that the Defendant overcame the independent business judgment of Plaintiff regarding retail price by any means that went beyond prior announcement and mere declination, regardless of whether Defendant was in concert or combination involving a "common purpose" with any third person or persons (R. 113, 119-120, 126). Plaintiff elected to go to the jury only on the issue of "combination", thus eliminating from the Court's instructions the standard instructions on conspiracy with their emphasis on common purpose, and amended its complaint accordingly (R. 111, 141).

On May 13, 1965, trial was resumed. The jury returned a verdict in favor of Respondent-Defendant, and judgment was entered accordingly (R. 131-132, 142).

On May 21, 1965, Petitioner-Plaintiff filed a motion for judgment n. o. v., or alternatively for a new trial, on the ground that the facts showed a violation as a matter of law of Section 1 of the Sherman Act, under **United States v. Parke, Davis & Co.** (1960), 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (R. 132-137, 142). On June 15, this motion was overruled (R. 137-138, 142). Notice of appeal was filed June 24, 1965 (R. 138, 142).

The Court of Appeals affirmed, holding:

(1) "Globe-Democrat's activity here did not hinder, but fostered and actually created competition to the benefit of the public" (App. A, p. 24).

(2) "Globe-Democrat did not combine with anyone" (App. A, p. 26).

(3) "... there was no coercion other than providing legal competition" (App. A, p. 27):

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is in conflict with applicable Supreme Court and Federal appellate decisions; does injustice to Petitioner and all home delivery newspaper carriers throughout the United States; and opens a serious gap in the enforcement of the antitrust laws.

From at least the time of the **Schrader** case, in 1920, it has been clear that the purpose of Section 1 of the Sherman Act with respect to resale price maintenance is to prevent the supplier from overcoming his customer's independent judgment on resale pricing by unacceptable means. **United States v. Schrader's Son, Inc.** (1920), 252 U. S. 85, 99. **Parke, Davis**, in 1960, said that so long as the **Colgate** doctrine was not overruled, overcoming the customer's independent judgment must be tolerated when it is the consequence of mere refusal to sell in exercise of the manufacturer's right of customer selection, but that:

"When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act." **United States v. Parke, Davis & Co.** (1960), 362 U. S. 29, 44.

One man, small in resources, but large in courage and faith, dared to believe that when he was cast out as an employee and lost the rights incident thereto, he then had the right to set his own price. For three years he withstood the pressure of being advised and requested to comply with the newspaper's suggested resale price. Just 19 days after the newspaper began to take away his subscribers by telling them they were being overcharged, and by employing Milne Circulation Sales Corporation to solicit away Petitioner's customers, Petitioner's independent business judgment was overcome and he reduced his price to \$1.60, the suggested price. The newspaper tried to force Petitioner to agree to comply. It first turned the abducted subscribers over to another carrier, Kroner, so that they could be withheld as long as necessary; then offered to return them if Petitioner would agree to comply. When Petitioner sued, the newspaper terminated; refused to return the abducted subscribers so that the complete list on Route 99 could be sold to the new carrier; and then told Petitioner that if he bought back the subscribers from Kroner and dropped the suit, they would withdraw the termination if he would agree to comply with their resale price. Petitioner refused. Unless this petition is granted, a supplier will have been permitted to go far beyond mere announcement of its resale price policy and refusal to deal for non-compliance as permitted under **U. S. v. Parke, Davis & Co.**, supra. Instead, approval will have been granted to a supplier, which could not induce an independent merchant to comply voluntarily with its suggested resale price for newspapers, to solicit directly the merchant's customers and to entwine other persons, Petitioner's customers, Milne Circulation Sales Corporation and Kroner, in Respondent's efforts admittedly undertaken for the purpose of effecting adherence to its resale prices. As a matter of law, Respondent's efforts to maintain the resale price of its newspapers overcame Petitioner's independent judgment

on resale pricing by clearly unacceptable means, and thus violated Section 1 of the Sherman Act.

It is of great importance that the Respondent and others in his position should not suffer loss of profits and destruction of business for acting on the belief that, except for his supplier's narrow right of refusal to sell pursuant to customer selection, an independent merchant has the right to set his own price. It is of even greater importance that if the ruling below stands it will open a serious gap in the enforcement of the antitrust laws. Under this ruling every newspaper in the country can deny every home delivery carrier the benefits of an employee relationship, but still dictate his price. The publisher has sole control over whether carriers are employees or independent merchants, under the National Labor Relations Board rule. If the publisher reserves control over manner and means, carriers are employees; but if he reserves control only as to result sought, they are independent contractors. **Lindsay Newspapers, Inc.**, 130 N. L. R. B. 680 (1961), *aff'd*, 315 F. 2d 709 (C. A. 5, 1963). This rule was the basis for Respondent's refusal to enter into a new contract with the St. Louis Carriers Union in 1961, and the N. L. R. B. subsequently upheld that action by refusing to certify the union. **The Pulitzer Publishing Co.**, 146 N. L. R. B. 302 (1964), *infra*, p. 25. The cases of **Lindsay Newspapers, Inc.**, *supra*, and **The Pulitzer Publishing Co.**, *supra*, as well as the cases cited in those cases reveal how widespread the problem of carrier-publisher relationship is in the newspaper industry throughout the United States. Definitive determination of the questions raised herein with respect to newspaper carriers and newspaper publishers is, therefore, important. This case thus presents questions of intrinsic legal significance in an economic setting of national consequence.

The grounds given by the Court of Appeals for its affirmance cannot stand examination.

(1) No restraint of trade because the consumer was benefited by a lower price. This is squarely in conflict with the Supreme Court rule that the independent resale pricing judgment of the customer cannot be destroyed even for the purpose of benefiting the buyers at the next lower level of distribution. **Kieffer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.** (1951), 340 U. S. 211, 213. Consistently, in the **Standard Stations** case, the Court also refused to accept the position of the dissenting opinion, quoted herein by the court below (App. A, p. 17) that would permit the supplier to impose the control of requirements contracts on independent service station operators in order to avoid the possible greater restriction of vertical integration. **Standard Oil Co. v. United States** (1949), 337 U. S. 293, 318-320.

(2) The newspaper did not connive with third persons who shared a common purpose injurious to Petitioner. To require a common purpose between the supplier and a third person or persons as a requisite to finding unlawful resale price maintenance is in conflict with applicable Supreme Court decisions. The statement of the rule in **Parke, Davis** does not require any third person with whom the supplier acts in concert and common purpose, *supra*. It is true that on the facts of that case the manufacturer did act in concert and common purpose with wholesalers, and with some non-price cutting retailers, *supra*, at pp. 45-47. However, in the later case of **Simpson v. Union Oil**, this Court made it clear that only two parties—the supplier and his coerced customer—are requisite to finding unlawful resale price maintenance, when it held to be a violation the termination of a retailer's lease for refusal to accept an unlawful consignment agreement. **Simpson v. Union Oil Co. of Calif.** (1964), 377 U. S. 13, 17. If it should be argued that the case is different if no agreement is involved and “combination” must be the operative word of the statute, rather than “agreement”, then the Court

of Appeals for the Eighth Circuit, herein, would be in conflict with the Courts of Appeals in the Fourth and Ninth Circuits, who have held in recent cases that a "combination" in violation of Section 1 of the Sherman Act is created when, in the absence of any agreement between them, a gasoline supplier by his own unilateral coercion overcomes the independent judgment of his retailer-customer and imposes upon him resale prices or tied products. **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566, 573-575 (C. A. 4, 1963); **Lessig v. Tidewater Oil Co.**, 327 F. 2d 459, 466, 472 (C. A. 9, 1964).

(3) The pressures against Petitioner were not "coercion" because they were "competition". Acts lawful in themselves may be violations of the antitrust laws when done with an intent to unreasonably restrain trade. **Poller v. Columbia Broadcasting System, Inc.** (1962), 368 U. S. 464, 468. However, there is no need to consider whether good faith competition would be an exception to the narrow rule of **Parke, Davis**. Herein the newspaper had no intent to go into the carrier business, sought no profit from it, delivered papers for the shortest possible time, asserted no proprietary interest in the customer list, and never ceased to use the abducted subscribers as a lever to pry out of Petitioner agreement to comply with its suggested resale price. No case could be more clearly outside the tort immunity of "competition" as defined by the leading case of **Tuttle v. Buck** (1909), 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599, and Section 709 of the Restatement of Torts.

CONCLUSION.

The ruling below reflects a serious failure to follow the applicable decisions of this Court, allows injustice to be done to Petitioner, and opens a gap in the enforcement of the antitrust laws, which could be exploited by every

newspaper publisher in the United States. This petition for a writ of certiorari should, accordingly, be granted.

Respectfully submitted,

By

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State of Missouri; }
County of St. Louis. } ss.

I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 13 day of January, 1967, I served 2 copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By

Donald S. Siegel;

Member of the Bar of the United
States Supreme Court.

APPENDIX.

APPENDIX A.

**United States Court of Appeals
For the Eighth Circuit.**

No. 18,161.

Lester J. Albrecht,

Appellant,

v.

The Herald Company, a corpora-
tion, d/b/a Globe-Democrat
Publishing Company,

Appellee.

} Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

[October 20, 1966.]

Before MATTHES, MEHAFFY and GIBSON, Circuit Judges.

MEHAFFY, Circuit Judge.

This is a treble damage action under § 4 of the Clayton Act, 15 U. S. C. A., § 15, for violation of § 1 of the Sherman Act, 15 U. S. C. A., § 1.

Lester J. Albrecht (hereafter plaintiff) appeals from a judgment entered pursuant to a jury verdict finding for The Herald Company, a corporation, d/b/a Globe-Democrat Publishing Company, defendant-appellee (hereafter Globe-Democrat). We affirm.

For many years the Globe-Democrat has been a morning newspaper in St. Louis, Missouri, delivered to home customers of the St. Louis and other areas through a

system of 172 routes. Globe-Democrat carriers are entrepreneurs, purchasing their papers at wholesale and selling them at retail. Plaintiff owned and operated Route 99 in the City of Kirkwood, St. Louis County, said route consisting of some 1200 customers.

Globe-Democrat advertised in its newspaper a suggested retail price. Each carrier had an exclusive territory but was subject to termination *inter alia* for charging more than the suggested retail price. In case of termination, the carrier was given sixty days to provide a satisfactory purchaser for his route. Plaintiff had knowledge of Globe-Democrat's written price policy.¹

Plaintiff adhered to the suggested retail price for several years but started overcharging in 1961. He admittedly received calls from Globe-Democrat about reported overcharging in 1961 and 1962. Finally, on May 20, 1964 Globe-Democrat wrote plaintiff as follows:

"The Globe-Democrat Publishing Company has received and referred to you a large number of complaints from customers in the territory you are servicing as a carrier that you are charging subscribers more than the publisher's suggested retail price.

"The system we customarily follow of respecting as exclusive territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of over pricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail our-

¹ "The right of each carrier whose appointment is effective to sell the St. Louis Globe-Democrat by home delivery in his territory, will be maintained exclusively to him under the terms of his appointment so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher for such sales in the City or County in which such territory is located."

selves or for resale by another carrier at the lower prices in the over-priced territory.

"In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter."

The enclosed letter advised the residents of the territory that some subscribers were being overcharged and that the Globe-Democrat would deliver the paper at the suggested retail rate.² These letters evidenced Globe-Democrat's decision to compete and provide its readers with the paper at the suggested rate. In addition, Globe-Democrat directed the Milne Circulation Sales Corporation, a national firm with a St. Louis office, whose business it was to procure readers for newspapers throughout the country, to engage in telephone and house-to-house solicitation to all the residents of the area in Route 99.³ The customers thus procured—some new—some who had quit because of plaintiff's overcharge—some who changed to take advantage of the lower price—were furnished home delivery of the paper by Globe-Democrat personnel. This campaign resulted in a customer list of 314 by July 7, 1964. Globe-Democrat did not want to engage in the carrier business,

² "It has come to our attention that some Kirkwood area readers of the Globe-Democrat who subscribe to our paper through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price. The suggested retail rate for the Globe-Democrat for delivery by carrier is \$1.60 per month for the daily paper, plus 20 cents for each issue of our weekend paper. In addition, the premium on reader insurance is 10 cents per week, if desired.

"If you are being charged more for the paper than our suggested retail rate, please advise us of this condition on the enclosed form and we will deliver the paper to you at the suggested retail rate.

"If you are not a regular reader of our paper, we know that you will find the Globe-Democrat stimulating, informative and exciting. Please fill in the enclosed form and we will start service at once."

³ Milne worked exclusively for the Globe-Democrat in the St. Louis area.

and in July of 1964 advertised the new route as available without cost. George John Kroner took over the route. Kroner, a route carrier in another neighborhood, knew the Globe-Democrat would not tolerate overcharging. He knew why the route was given to him without charge and understood that he might have to return it to Globe-Democrat if plaintiff sold his route or discontinued his overcharging practice.

During this period and thereafter, Globe-Democrat continued to sell its papers to plaintiff and plaintiff continued to serve his customers. On June 1, 1964, Globe-Democrat again objected to plaintiff about overcharging and warned plaintiff that legal steps would be taken if necessary. Following this warning, a conference between plaintiff and Globe-Democrat took place. Plaintiff was told that he could charge any price he wanted, but unless the Globe-Democrat's policy was followed, the Globe-Democrat did not have to do business with him. Plaintiff continued his practice of overcharging.

On or about July 27, 1964, a representative of Globe-Democrat told plaintiff that the Globe-Democrat was not interested in being in the carrier business and would be happy if plaintiff would take the customers back so long as he charged the suggested retail price. Plaintiff made no commitment but left the meeting and made an appointment with his attorney to bring this lawsuit. On August 21, 1964, after institution of the suit, Globe-Democrat notified plaintiff of termination of his appointment as a Globe-Democrat carrier:

"We have received a copy of the Complaint which you have filed in the U. S. District Court asking damages from us in the amount of three hundred forty thousand dollars.

"It seems apparent that the prosecution of this action is clearly inimical to the purpose for which your appointment as carrier was made and you are hereby

notified that your appointment as carrier is terminated.

"However, in accordance with our statement of policy, we will nevertheless give you the opportunity of producing a substitute whose credit, experience and efficiency is satisfactory to us, and we will not object to his appointment on the ground that he may be paying you in connection therewith. Under the circumstances, with the lawsuit pending, we believe that sixty days is a reasonable time for this purpose.

"Accordingly, we shall cease selling you newspapers on October 21st, 1964. In the meantime, we will be ready to interview any substitute you may wish to produce."

Thereafter, Globe-Democrat granted plaintiff an extension of nine days to consummate the sale of his route. He sold the route for \$12,000.00, \$1,000.00 more than he had paid for it, but less than he could have gotten if Globe-Democrat had returned Kroner's 300 odd customers then comprising Route 198. Despite the competition, plaintiff retained some 900 of his original 1200 customers.

This case went to the jury, which considered the sole question whether § 1 of the Sherman Act was violated by reason of a "combination" between the Globe-Democrat and plaintiff's customers or with Milne or Kroner. This was plaintiff's theory under his amended complaint. The original complaint was in two counts, the first of which plaintiff dismissed before trial. During trial plaintiff amended Count II, eliminating the charges of conspiracy and agreements and charging a "combination" between the Globe-Democrat and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."⁴

⁴ "Plaintiff by its motion to amend the Complaint now desires to eliminate from the consideration of the jury any reference to a conspiracy under Section 1 of the Sherman Act or an illegal agreement under Section 1 of the Sherman Act, and desires that the

In charging the jury, the District Court used as its principal guide the teachings of *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960).⁵

case be submitted to the jury solely on the question of a combination under Section 1 of the Sherman Act.

"Is that correct, gentlemen?"

"Mr. Siegel: Yes."

"Mr. Dorsey: Yes, Thank you."

"The Court: Very well."

⁵ "The only ground of liability submitted to you, therefore, is the question of whether the defendant combined with some other person or persons to violate Section 1 of Title 15 U. S. C. A., providing 'Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal. . . .'

"The effect of this act is to forbid combinations of traders to suppress competition, as competition, not combination, should be the law of trade."

"A combination is a concerted course of action between the defendant and one or more persons. This may be with an agreement either expressed or implied or it may be without an agreement. In order to have a combination there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means. The purpose of the combination must be the applying of coercion in some manner which unduly hinders or obstructs the free and natural flow of commerce in interstate trade."

"A seller has the right under the law to announce a resale price policy and decline to sell to those persons who fail to refuse to adhere to this policy. Such action is not an unlawful combination in violation of the Sherman Act."

"A seller may not announce a suggested resale price and thereafter enter into a combination with another person or persons, which goes beyond the mere refusal to sell and applies coercive action to enforce or obtain adherence to the suggested resale price. This is an unlawful combination prohibited by the Sherman Act."

"This is true whether the suggested price is a minimum price of (sic) a maximum price."

"Nothing in the Sherman Act requires that a seller of a product must grant to a customer the exclusive right to resell the product in a given territory, and for this reason it is not a violation of the act for the seller of a product either to complete (sic) in good faith with his own customer in a given territory or to permit any other customer to compete with him in that territory. Indeed, it is not a violation of the act for the seller of a product to announce, so long as he neither conspires or combines with another person for this purpose, that he will refuse to sell to any customer who does not, in turn, resell at the suggested resale price or to make adherence to the suggested price a condition to the main-

Restraint of trade embraces only acts, contracts, agreements or combinations which restrict competition or unduly obstruct due course of trade, thereby operating to

tenance of the exclusive right to sell in a particular territory, nor to terminate commercial relationships with a customer who does not adhere to the suggested retail price; nor is it a violation of the Act to refuse to deal with someone solely because he has brought a lawsuit against his supplier.

"The gist of the right of action claimed by the plaintiff under this Act is that the defendant combined with some other person in a combination designed to coerce the plaintiff to maintain adherence to the suggested retail price.

"To engage in 'competition' means to take actions which are calculated to acquire the business or customers of others in the sale of a product or commodity where the effort to gain that business or customers is made in 'good faith.' Good faith in this connection means for the purpose of engaging in the sale of that commodity or product, and getting customers for oneself, and not for the sole purpose of inflicting injury upon another by taking his customers away from him. Evidence showing good faith or bad faith is: whether or not the actor remains in that business after he has accomplished the injury; whether or not his acts and statements indicate that he is, in fact, intending to engage in that line of business or commerce for his own benefit and profit. Actions calculated to acquire customers or patronage, but not done in good faith, as indicated by the enumerated criteria, are, in fact, not competition.

"If you find that a combination was entered into between the defendant and Milne Circulation Sales, Inc.; and/or George Kroner and/or the plaintiff's customers, and pursuant to such combination the defendant or George Kroner or Milne Circulation Sales, Inc., solicited the plaintiff's customers for the purpose of coercing the plaintiff to follow the defendant's suggested retail price, then you shall find that the defendant violated the antitrust laws.

"If you find an unlawful combination was formed and that the defendant pursuant to such combination terminated the working relationship between itself and the plaintiff to coerce the plaintiff to follow the defendant's suggested retail price, or terminated because plaintiff refused to comply with the defendant's suggested retail price, then this constitutes a violation of the antitrust laws, even if the right to compete or to terminate was reserved to the defendant in a statement of policy.

"If you find that no combination has been proved, then your verdict should be for the defendant; even if you find that a combination existed then before you may find for the plaintiff, you must find that damage resulting to the defendant was the result of this combination. In other words, if you find that the damage done to the plaintiff, if any, was caused not by the combination, then even though you find that such combination did exist, your verdict will be in favor of the defendant."

the prejudice of the public. The Supreme Court said in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493 (1940):

“The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . . .”

and in *Northern Pac. R. Co. v. United States*, 356 U. S. 1, 4 (1958): “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” See also *United States v. American Linseed Oil Co.*, 262 U. S. 371, 388-89 (1923); *American Column & Lumber Co. v. United States*, 257 U. S. 377, 400 (1921); *Eastern States Retail Lumber Dealers’ Ass’n v. United States*, 234 U. S. 600, 610 (1914); *Kansas City Star Co. v. United States*, 240 F. 2d 643, 658 (8th Cir. 1957), cert. den., 354 U. S. 923 (1957); *Feddersen Motors, Inc. v. Ward*, 180 F. 2d 519, 521 (10th Cir. 1950).

Globe-Democrat’s activity here did not hinder, but fostered and actually created competition to the benefit of the public. To have condoned plaintiff’s overcharging would have been a signal to all carriers, each monopolistic in his own right, to mulct the public for all the traffic would bear.

If Globe-Democrat’s activities constitute a violation of the antitrust laws, it has only one alternative, and that is to terminate all home delivery carriers by the simple declaration to sell. Globe-Democrat could then make the home deliveries by its own employees. It would thus automatically become a monopolist itself and wreck such havoc as Mr. Justice Douglas decried in his opinion in *Standard Oil Co. v. United States*, 337 U. S. 293, 318-319 (1949):

"But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one."

The routes are valuable property rights owned by the 173 carriers. Carriers were dealt with fairly as shown by the evidence of profit ensuing and sale price of the routes. There is no suggestion in the record to the contrary. Moreover, it was Globe-Democrat and not the carriers which constantly sought additional customers to carriers' benefit through the exclusive employment of Milne Circulation Sales, Inc. for that purpose. Thus, if Globe-Democrat resorted to its only alternative, the cure would be worse than the disease. Globe-Democrat by becoming a monopolist would not benefit the public one whit. The facts in this case demonstrate, without question we think, no evil at which the Sherman Act struck. Furthermore, pursuing the alternative would destroy valuable property rights, and one of the purposes of Sherman was to preserve and protect property rights. The Supreme Court said in the first *Standard Oil* case, 221 U. S. 1, at 78 (1911), "... one of the fundamental purposes of the statute is to protect, not destroy, rights of property."

The principal issue is whether the record evidence compels, as a matter of law, a conclusion that Globe-Democrat participated in an unlawful combination in restraint of trade.

"Home delivery of newspapers, for longer than anyone can remember, has been conducted by a system of exclusive routes. Practicality dictates this as a morning news-

paper must be delivered to the homes of readers throughout the city by a certain time. When one of the witnesses was asked how long such a method of distribution had been used by Globe-Democrat, he answered "forever." Other than payment of bills and timely delivery of the paper in good condition, the only requirement of Globe-Democrat carriers was that the public not be overcharged. Obviously, this policy was adopted to comply with the antitrust laws by insuring competition necessary for the protection of the public. Home delivery by the route system is monopolistic, whether done through independent merchants such as plaintiff, or done by the publisher. The public's protection from the harmful effects therefrom can be guaranteed only by preventing overcharging through insuring competition.

Combination is usually defined as the union or association of two or more persons for the attainment of some common end.⁶ Globe-Democrat did not combine with anyone. Its action taken to provide competition to plaintiff was completely unilateral. When customers started complaining and some discontinuing their subscriptions, Globe-Democrat warned plaintiff. When Globe-Democrat's repeated warnings were ignored, it offered plaintiff's dissatisfied customers its product at its announced price. It did this first by letter followed by telephone and door-to-door campaign. It delivered the customers thus obtained by its own employees. Globe-Democrat acted only through its employees and agents. All the while, it continued to sell papers at wholesale to plaintiff. Thus, it became a carrier itself in competition with plaintiff. Once Route 198 was established by Globe-Democrat, competition was *fait accompli*. It was only thereafter that the new route was given to Kroner. Even after this, Globe-Democrat

⁶ Joyce on Monopolies #1; Thornton Combinations in Restraint of Trade; ¶ 141, p. 96; Webster's Third New International Dictionary; Black's Law Dictionary, 4th Ed.

attempted to persuade plaintiff to desist from overcharging. Plaintiff, however, filed this suit, which led to his termination as a carrier. Globe-Democrat had a legal right to terminate plaintiff for filing the lawsuit.⁷ It had the right to decline to sell papers to him for good cause, no cause, or any cause except in conjunction with a scheme to violate the antitrust laws. *United States v. Parke, Davis & Co.*, *supra*; *United States v. Colgate & Co.*, 250 U. S. 300 (1949); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867 (2nd Cir. 1962).

Ordinarily, the existence of restraint of trade is a question of fact for the jury's determination.⁸ Plaintiff insists however, that, as in *Parke, Davis & Co.*, the question here is one of law and not of fact. If that be the case, our conclusion would be the same, as we are convinced that plaintiff failed to establish a Sherman Act violation.

Plaintiff argues that this case is controlled by *Parke, Davis* and the "per se" cases such as *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Neither *Parke, Davis* nor any of the "per se" cases are apposite in fact to the case at bar. Aside from the fact that plaintiff here eliminated any charge of conspiracy or agreement; that no combination whatsoever existed; and there was no coercion other than providing legal competition, the record evidence reveals many obvious distinctions from any of the reported cases relied upon by plaintiff.⁹

⁷ Plaintiff continued to service his route until consummation of its sale but in the interim desisted from overcharging.

⁸ In *Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co.*, 339 F. 2d 277, 280 (6th Cir. 1964), the court stated, "Whether a restraint is unreasonable or whether there is any restraint is a question of fact. (Citations omitted.)" Compare *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211 (1951).

⁹ Not cited is the case most closely akin: *John J. and Warren H. Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E. D. Penn. 1964). The court there held that the newspaper's resale price policy was maintained and enforced within the permissible

As examples, none of the cited cases involves a business whose product must be delivered daily at a certain time by a monopolistic delivery man; and in none does the sales price of the product to the consumer represent only a fraction of the cost of the product.¹⁰ In none is the only alternative a monopoly leaving unprotected the public interest. In none did the only alternative result in destruction of valuable property rights which the Sherman Act seeks to protect. In none did the producer continue to sell to the distributor on the same terms, but also provide the public with the alternative to purchase the product at a lower price.

Plaintiff's reliance on *Parke, Davis* is misplaced. The Court there found an illegal combination violative of the Sherman Act:

"In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." *Supra* at 45.

Contrarily, in the instant case Globe-Democrat's activities were unilateral and no combination was formed. At this juncture, Globe-Democrat had not gone so far as to decline to sell—it continued to sell to plaintiff at the same price. After competition was established, plaintiff re-

bounds of *Colgate* and *Parke, Davis*. On appeal, the Third Circuit by per curiam opinion (344 F. 2d 775 (1965)) refrained from passing on the legal issues in holding only that the District Court did not abuse its discretion in refusing to award a preliminary injunction.

¹⁰ The principal income of a newspaper is derived from its advertising. Its advertising rates are based on its circulation which is the lifeblood of a newspaper and accounts for utilization of such agencies as Milne here in a constant effort to increase circulation. For statistics on advertising revenue, see *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594 (1953).

tained some 900 of his original 1201 customers. Only later when plaintiff brought suit was he terminated. Even then the Globe-Democrat continued to sell him until he sold the route.

Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211 (1951), furnishes plaintiff with his strongest "per se" argument. *Kiefer-Stewart* is inapposite as in that case an agreement existed among competitors to fix a maximum resale price, thus forming an illegal combination. In *Kiefer*, there was no route system necessary, no timely home delivery required, and no natural monopoly involved whether done by the producer or distributor.

We will not unduly burden this opinion by demonstrating distinctions between this and other cases, but it can safely be said that commencing with the first case under the Act, *United States v. Knight*, 156 U. S. 1 (1895), and continuing through *United States v. General Motors*, 384 U. S. 127 (1966), all reported cases are readily distinguishable from the case at bar.

The Supreme Court in *United States v. Hutcheson*, 312 U. S. 219, 230 (1941), said, "by the generality of its terms, the Sherman law has necessarily compelled the courts to work out its meaning from case to case." It is because of the generality of the terms of the Act coupled with the complexity of modern business that such rules as *Parke*, *Davis* and the "per se" became necessary for the public's protection. The basic purpose—the ratio decidendi—of the Sherman Act was protection of the public interest and preservation of freedom of competition. We, therefore, cannot construe the Sherman Act to compel Globe-Democrat to pursue a course which would restrict competition to the prejudice of the public interests.

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an

unjust or an absurd conclusion." *In Re Chapman, Petitioner*, 166 U. S. 661, 667 (1897); *Lau Ow Bew v. United States*, 144 U. S. 47, 59 (1892); *State of Maryland v. United States*, 165 F. 2d 869, 872 (4th Cir. 1947).

The rule of reason conceived in the original *Standard Oil* case, *supra*, is but a rule of common sense and must be applied to the instant case if the public is to be protected.

Those familiar with the historical background of the Sherman Act will recognize that none of Globe-Democrat's actions resembles the evils that led to the enactment of the statute. It must be conceded that the Globe-Democrat could have declined to do business with plaintiff and deliver the papers itself or through another with impunity. Globe-Democrat did not go this far and should not be penalized for its plan to protect the public against overcharging. Neither should plaintiff be rewarded for his avarice. A common sense consideration of the record evidence compels the conclusion that Globe-Democrat's action in providing competition did not remotely restrain trade, but, contrarily, fostered competition, and, therefore, our conclusion is consistent with the Sherman Act and the teachings of the Supreme Court.

As a subsidiary issue, plaintiff contends the court erred in instructing the jury that in order to have a combination, there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means. This was the plaintiff's theory of the case and the only basis for recovery alleged in his complaint as amended. It was the theory upon which the case was tried and upon which plaintiff's counsel argued to the jury.¹¹ It is too late after conclusion

¹¹ Counsel's statement to jury:

"The issue involved in this case is a relatively simple one. We have tried to eliminate from the Complaint those matters which we thought might be confusing and somewhat repetitious

of the evidence for plaintiff to shift theories. *Cf. Armstrong Cork Co. v. Lyons*, ... F. 2d. ... (8th Cir. Sept. 21, 1966), and cases there cited; *Whiteside v. W. T. Bailey Lumber Co.*, 274 F. 96 (8th Cir. 1921) and *Bracken v. Union Pac. R. Co.*, 75 F. 347 (8th Cir. 1896). In any event, this assignment of error, as well as the others relating to the court's refusal to give certain proffered instructions, is of no consequence by reason of our conclusion that the undisputed evidence fails to show a Sherman Act violation.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

or redundant in the way of claims in this matter; so that this case is now boiled down to the simple, single issue, so far as liability is concerned, as to whether or not the defendant entered into an unlawful combination with Milne or Kroner or plaintiff's customers is an effort to try to obtain adherence to the defendant's suggested retail price."

APPENDIX B.

Agreement.

This Agreement is made and entered into this 25th day of September, 1964, by and between Lester J. Albrecht, sometimes hereinafter referred to as the Seller, and Eugene Schwarzenbach, sometimes hereinafter referred to as the Purchaser.

Whereas, the Seller and the Purchaser had agreed on September 11, 1964, that the Purchaser would purchase from the Seller, St. Louis Globe-Democrat Newspaper Carrier Route No. 99, in St. Louis County, Missouri for the price of Twenty-Four Thousand (\$24,000.00) Dollars, and be exclusive carrier for and within said Route No. 99 for home delivery; and

Whereas, The Herald Company d/b/a Globe-Democrat Publishing Company did on September 15, 1964, refuse to recognize the Purchaser as the exclusive newspaper carrier within said Route No. 99, and refused to turn over to the Purchaser new starts within said Route No. 99, or customers now being served by another carrier within said Route No. 99; and

Whereas, the Seller and the Purchaser have since September 15, 1964, negotiated a new sales price for said Route No. 99; and

Whereas, The Herald Company d/b/a Globe-Democrat Publishing Company did on September 22, 1964, approve the Purchaser as a non-exclusive carrier for said Route No. 99, but still refused to give the Purchaser new starts within said Route No. 99.

Now, Therefore, the parties hereto mutually agree that:

1. The Seller hereby agrees to sell and the Purchaser hereby agrees to purchase St. Louis Globe-Democrat

Newspaper Carrier Route No. 99 in St. Louis County, Missouri, as presently owned by the Seller, plus a 1960 Chevrolet carry all truck and tying machine for the sales price of Twelve Thousand (\$12,000.00) Dollars which amount shall be paid as follows:

\$1,000.00 on September 25, 1964, and the balance of Eleven Thousand (\$11,000.00) on or before October 31, 1964.

2. The Seller shall have the right to all profits, including accounts receivable, earned up to and including October 31, 1964, and shall be responsible for all liabilities incurred on or prior to October 31, 1964. The Purchaser shall be entitled to all profits earned from and after November 1, 1964, and shall be responsible for all liabilities incurred on and after November 1, 1964.

In Witness Whereof, the parties have hereunto set their hands and seals on the day and year first above written.

/s/ Lester J. Albrecht,
Seller,

/s/ Eugene Schwarzenbach,
Purchaser.

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Supreme Court, U.S.
FILED

FEB 23 1967

JOHN T. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966 ⁷

No. ~~9-15~~ 43

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

**REPLY TO BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

To the United States Court of Appeals for the
Eighth Circuit.

DONALD S. SIEGEL,
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IN THE
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Eighth Circuit.**

Respondents' brief in opposition is not in compliance with Supreme Court Rule 24 in that it is not based on grounds for granting or denying certiorari as indicated in Rule 19. Further, Respondents' Brief contains statements about the pleadings and evidence which Petitioner will show to be inaccurate and misleading if opportunity to argue to the merits is granted. The facts set forth in the Petition for a Writ of Ceriorari are either admitted or uncontroverted, and the Question Presented is squarely

before this Court. We respectfully submits the Petition should be granted.

Respectfully submitted,

By

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PA. 7-0922,

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HO. 9-3362,

Attorneys for Petitioner.

Certificate of Service.

State of Missouri, }
County of St. Louis. } ss.

I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 21 day of February, 1967, I served 2 copies of the foregoing Reply to Brief in Opposition to Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By

Donald S. Siegel,
Member of the Bar of the United
States Supreme Court.



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FEB 11 1967

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966⁷

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Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

To the United States Court of Appeals
for the Eighth Circuit.

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IN THE
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Repondent.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

To the United States Court of Appeals
for the Eighth Circuit.

CONSTITUTIONAL PROVISION INVOLVED.

U. S. Constitution, Amendment VII:

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

ARGUMENT.

I

Concerning the Petition and the Record.

The petition in this case advances one single "Question Presented" reading as follows (Pet. 2):

"Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent merchant carriers in order to induce him to comply with the suggested resale price and then terminating sales to him for his continued refusal to agree to comply are in violation of Section 1 of the Sherman Act."

Under Rule 23.1 (c) of this Court, review of all matters not fairly comprised in this question is abandoned.

1.

At the trial petitioner abandoned his charges of *conspiracy* and *collusion* against defendant and amended his complaint to eliminate these words, and their derivatives, wherever they appeared in that pleading, "In order," he said, "to conform to the evidence" (R. 110, 111). Petitioner's motion to amend, which was opposed by respondent, but granted by the trial judge, was filed *after* the evidence was all in, and while court and counsel were making up the charge (R. 109). Presumably, petitioner and his counsel, after all the evidence had been heard, were capable of judging finally whether there was any submissible evidence of conspiracy, collusion or agreement between defendant and "a person or persons unknown to plaintiff" (R. 7). Since the hasty motion to amend neglected to eliminate also the allegation that the conspiracy was "accomplished and brought about by contracts, agree-

ments and understandings",—words appropriate to a conspiracy, but not to a combination,—the following colloquy occurred (Supp. R. 2):

"Mr. Hocker: What are you going to do with the words 'contract, agreement and understanding' that appear in Paragraphs 18 and 19? Are they deleted or left in?

"Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

The double-talking exception made no impression on the trial judge, who instructed the jury, without objection from petitioner, that petitioner had abandoned not only the charge of conspiracy and collusion, but also the charge that the conspiracies were accomplished and brought about by illegal contracts and agreements (R. 125).

The amendment, filed far too late for a motion to make more definite and certain, or for clarification by interrogatories or deposition, substituted for the charge of conspiracy "*with a person or persons unknown*" (Complaint, par. 19, R. 7), the charge of combination with "plaintiff's customers" [there were 1201 of them, R. 38] "and/or Milne Circulation Sales, Inc." [who for a fee solicited subscribers for respondent, R. 64, 65], "and/or George Kroner" [to whom respondent later gave the list of subscribers it had obtained, R. 72, 73].

Neither in the trial court, nor in the Court of Appeals, nor in his petition in this court has the petitioner specified which of the class of 1203 he identified in his amended complaint he thinks that the court should have ruled, as a matter of law, that the defendant combined with.

We think, for reasons set out in detail in our brief in the Court of Appeals, that petitioner totally failed to

prove a combination with any one of the 1203 members of the class named in the complaint. The Court of Appeals so held (Petition p. 26).

But the significant point in *this* court is that by the Question Presented as stated in this petition the petitioner has now abandoned the allegation of *combination*, as well as that of *conspiracy*.

The Question Presented predicates *unilateral action only* by respondent. Neither conspiracy, nor collusion, nor contract, nor agreement, nor understanding, nor combination with *any person* is supposed in the question.

The Question Presented asks only whether a newspaper publisher may solicit away customers and terminate sales to a carrier without violating Section I of the Sherman Act.

Since Section I of the Sherman Act, 15 U. S. C. 1, requires either a "contract, combination in the form of trust or otherwise, or conspiracy", as a constitutive element of the acts it forbids, this crime cannot be committed *in vacuo*, so to speak. As it takes two to Tango, it takes two to violate Section I of the Sherman Act.

Of course, the paradoxical question of law proposed in the Question Presented, i. e., of single-handed combination, was not pleaded in the trial court (R. 6, 7), nor was it raised in the Court of Appeals. In both courts below, the petitioner conceded respondent's right to refuse to deal with petitioner unilaterally under the rule of U. S. v. Colgate, 250 U. S. 300.

In the trial court, petitioner offered, and in the Appellate Court complained of the refusal of, an instruction reading as follows (R. 120, 113) (App. Br. 38, 66, 28):

“Instruction No. 26.

“The Court instructs you that when a seller does no more than announce a resale price policy and a declination to sell to those who fail or refuse to adhere to such policy, he has not put together an unlawful combination. If, however, the seller goes further and *engages in actions with one or more persons*, extending beyond the bare announcement of his resale price policy and a declination to sell, in order to effect adherence to his resale price policy, then he has engaged in an unlawful combination in violation of the antitrust laws.”

Thus the “Question Presented” is not before the court in this record.

2.

The “Question Presented” states facts not supported in the record.

There was no evidence that respondent refused to deal with petitioner “*for his continued refusal to agree to comply*” “*with its suggested resale price*”, as the question states.

Actually, respondent continued to sell petitioner the newspapers, with which he competed, throughout the period during which it solicited his overcharged customers (R. 42).

The evidence, and the only evidence, of the cause of respondent’s “terminating sales to” petitioner was respondent’s letter of August 20, 1964, reading as follows (R. 48):

“Dear Mr. Albrecht:

“We have received a copy of the Complaint you have filed in the U. S. District Court asking damages

from us in the amount of three hundred forty thousand dollars.

"It seems apparent that the prosecution of this action is clearly inimical to the purpose for which your appointment as carrier was made and you are hereby notified that your appointment as carrier is terminated.

"However, in accordance with our statement of policy, we will nevertheless give you the opportunity of producing a substitute whose credit, experience and efficiency is satisfactory to us, and we will not object to his appointment that he may be paying you in connection therewith. Under the circumstances, with the lawsuit pending, we believe that sixty days is a reasonable time for this purpose.

"Accordingly, we shall cease selling you newspapers on October 21st, 1964. In the meantime, we will be ready to interview any substitute you may wish to produce.

Yours very truly,

Walter D. Evans,
Circulation Director."

3.

Petitioner's Question Presented turns wholly on whether the lower courts committed error in failing to declare a Sherman Act violation "as a matter of law".

There were only two opportunities for making the ruling as a matter of law: on the motion for summary judgment and on the motion for a directed verdict.

But no error in the ruling on the motion for summary judgment was preserved on the appeal; for petitioner amended his complaint twice prior to submission and after the motion for summary judgment was decided (R. 20,

R. 110, 111). Therefore, the complaint in *this* record is not, in significant respects, the complaint on which the summary judgment was sought. And in the second place, *what petitioner appealed from was not the ruling on the motion for summary judgment, but the judgment on the jury verdict of May 13, 1965* (R. 138).

Consequently, the only asserted error to which the answer to the question could be relevant is the refusal to grant the plaintiff's motion for a directed verdict. And on the record as it then stood, to grant this motion was simply impossible.

The complaint, after the last-moment amendment, predicated liability for violation of the Sherman Act (Par. 19 as amended, R. 6, 7, 110, 111) upon the allegation that defendant had entered into combination with

"plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner . . . and were accomplished and brought about by contracts, agreements and understandings between the Publisher and plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."

The designation of the defendant's accomplice or accomplices as "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner" was made by amendment, voluntarily, after the close of the evidence, "to conform to the proof" (R. 109, 110, S. R. 2).

The disjunctive "or", by definition, postulates alternatives. Pleading in the alternative is permissible in modern practice (Rule 8e 2, F. R. C. P.), because there may be sufficient evidence to justify the trier of the facts in finding the truth in any one of several hypotheses, even though mutually exclusive. But if a plaintiff cannot himself specify the wrongdoing more confidently than as one of 1203 mutually exclusive alternatives,—or 3, for that

matter,*—how can he find error in a court's unwillingness to declare it to consist of a particular alternative *as a matter of law*?

Obviously, he may not. The alternative pleader must submit his alternatives to the jury and be content to have it select the truth from the pleaded and possible alternatives. And he must ask this determination *as a finding of fact*, not *as a declaration of law*.

This is what was done, and the jury found as a fact that no such combination existed. To re-examine that finding of fact here would be a violation of U. S. Constitution, Amendment 7; because no error in the presentation of the issue to the jury is supposed in the Question Presented.

II.

Concerning the Merits of the Judgment.

While we are content to rely upon the opinion of the Court of Appeals as to the merits of the judgment, it may be well to point out one additional fact.

In *U. S. v. Parke-Davis & Co.*, 362 U. S. 29, 80 S. Ct. 503, upon which petitioner stakes his entire reliance, this court epitomized the whole of Sect. 1 of the Sherman Act in the traditional ten words of the "straight" telegram. It said (l. c. 44, 512):

"The Sherman Act forbids combinations of traders to suppress competition."

Who is the *trader* with whom respondent is charged to have combined?

Petitioner alleged in his amended complaint (R. 111) that the respondent combined with

* Actually, since the pleading is "and/or", the possible alternatives are any combination of one or more of the group; approaching the *square* of 1203; or seven, even if we regard the 1201 customers as one, i. e., A, B, C, AB, AC, BC, or ABC.

“plaintiff’s customers and/or Milne Circulation Sales, Inc., and/or George Kroner . . . and were accomplished and brought about by contracts, agreements and understandings between the Publisher and plaintiff’s customers and/or Milne Circulation Sales, Inc., and/or George Kroner.”

It was not shown that any of the plaintiff’s customers were traders. Nor was Milne Circulation Sales, Inc., which on a fee arrangement did the solicitation the respondent ordered it to do. None of these people traded in newspapers, or in anything else for that matter. Furthermore, under petitioner’s complaint, they were not possible co-combinees anyway; because in Paragraph 18 petitioner alleged that respondent’s combinations had been “with a person or persons engaged in the newspaper carrier business” (R. 6), and none was shown to have been in that business. But, neglecting pleadings for the trend of this argument, none was a trader.

All of the cases petitioner cites involve combinations with traders-wholesalers, retailers, distributors or dealers. So far as the opinions petitioner cites disclose, no one has ever claimed before that a combination in the form of trust or otherwise can exist between a manufacturer and his ultimate consumer, for whose benefit the law was designed. Nor between the manufacturer and its telephone operator, or its solicitor. Such people are not, as this court has said co-conspirators or co-combinees must be, **TRADERS.**

That leaves George Kroner. He was a trader. And of all the 1203 alleged possible co-combinees, Kroner was the only one “engaged in the newspaper carrier business”.

Now the charge urged by petitioner below (Plaintiff’s Requested Instruction No. 16, R. 113) requires that the combination be one beginning “on or about May 20, 1964”.

Kroner, a witness called by the petitioner, had nothing to do with the matter until July, when he saw the defendant's advertisement in the newspaper (R. 75). Thereafter, all he did on Albrecht's old route was to deliver to the customers on the list given him by the Globe-Democrat, at the regular subscriber's rate, from the middle of July, 1964 (R. 78) until December, 1964 (R. 80), when he sold this route to Schwarzenbach (R. 80), who had bought Albrecht's route the previous September 25 (R. 51, 52).

There is no evidence whatever that Kroner ever combined in any way with defendant. He acquired the customers from it *after* it had obtained them by price and service competition. And he was not shown to have had anything whatsoever to do with Albrecht's termination by defendant in November, 1964, which was the subject matter of the Supplemental Complaint.

There was utterly no evidence of a coercion of Kroner, and utterly no evidence that anything that Kroner did had anything to do with appellant's asserted damage. He answered defendant's advertisement and took over delivery to the 314 daily and 260 week-end subscribers (R. 73). He never solicited any persons to become his customers on this route (R. 79). He had previously been a Globe-Democrat carrier (R. 72) and had only a verbal understanding with them "That I was to handle that the same as I did Route 48. I was pay my bills weekly and bill the customers according to the prescribed rate" (R. 74). At this time he was not told the prescribed rate; as he already knew it (R. 74). He had previously been told that the Globe-Democrat would not tolerate overcharging the customers (R. 75). This was no more than the unilateral declaration of unilateral policy permitted by the Colgate rule, and knowing the policy Kroner took on the new route and customers. He did charge the regular prescribed rate (R. 79).

Even petitioner foreswears interpreting any of the testimony as showing any coercion of Kroner, or of any other carrier. At Par. 9 of his brief in the Court of Appeals, Petitioner said:

"Other than in the case of plaintiff, the Publisher has taken no other steps to enforce maintenance of the suggested retail price except to contact carriers whose subscribers have called to the Publisher's attention the fact that carriers were not charging defendant's suggested price, and then the Publisher requested them to do so."

As the only "trader" with which respondent is accused of combining was Kroner, and since Kroner had nothing to do with the acts which petitioner claims damaged him, it is clear that even if petitioner could lure back Omar's moving finger to cancel and rewrite his complaint, his submission at the trial, his brief on appeal, and his petition for certiorari, and if petitioner could, by his tears wash out the jury verdict, yet, even so, petitioner could never on the facts, as he proved them himself, be entitled to the relief he seeks.

The petition should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT,
Petitioner,

vs.

THE HERALD COMPANY, a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

**MOTION TO DISMISS FOR WANT OF JURISDICTION
WITH SUPPORTING BRIEF.**

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No. 975.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT,
Petitioner,

vs.

THE HERALD COMPANY, a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

**MOTION TO DISMISS FOR WANT OF
JURISDICTION.**

Comes now respondent, and pursuant to Rule 35 of the rules of this Court moves the Court to dismiss the writ of certiorari granted in this case; and for grounds of its motion alleges that this Court has no jurisdiction to accord petitioner relief, because the sole predicate of its jurisdiction of his claim is 15 U. S. C. 15, and that statute, both as it is sought to be applied in this case, and on its

face, is unconstitutional under the following provisions of the United States Constitution:

Article II:

Sect. 1: "The executive power shall be vested in a President of the United States of America."

Sect. 2: "The President . . . shall have power to grant reprieves and pardons for offenses against the United States."

Sect. 3: ". . . he shall take care that the laws be faithfully executed, and shall commission all officers of the United States."

Amendment IV:

"... no warrant shall issue but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched and the person or thing to be seized."

Amendment V:

Cl. 2: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Cl. 3: "... nor shall be compelled in any criminal case to be a witness against himself . . ."

Cl. 4: "... nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

Amendment VII:

"... no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law."

Amendment VIII:

“ . . . nor [shall] excessive fines [be] imposed, nor cruel and unusual punishment inflicted.”

Respondent respectfully requests that in view of the importance of the question the motion be assigned for oral argument pursuant to Rule 35 (3).

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BRIEF.

(a) Opinion.

The opinion of the Court of Appeals sought to be reviewed by this writ is reported in 367 F. 2d 517. It is set out at page 145, et seq. of the transcript.

(b) Jurisdiction.

Jurisdiction in the United States Courts of the petitioner's claim is predicated wholly on 15 U. S. C. 15 (T. 13), since Count I was voluntarily dismissed (T. 20).

"Statutes Involved" in this Court is stated to be Section 4 of the Clayton Act, 15 U. S. C. 15 (petition, page 2). The opening words of the opinion (367 F. 2d 518; T. 145) are:

"This is a treble damage action under § 4 of the Clayton Act, 15 U. S. C. A., § 15 . . ."

(c) Constitutional Provisions and Statutes Involved.

15 U. S. C. 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

The constitutional provisions involved are set forth in the body of the motion, *supra*.

(d) Question Presented.

The question presented by the motion is simply whether 15 U. S. C. 15 is constitutional.

(e) Statement of the Case.

For the purposes of the motion, it is sufficient to state that the action is one for treble damages under 15 U. S. C. 15.

(f) Summary of Argument.

Anti-trust treble damage suits are, to the extent of the doubled and trebled award, actions to impose a punishment upon the defendant in the right of the United States for the violation of a criminal statute. Since the trebling is done by the Court, after a jury finding as to the amount of the plaintiff's damages, the trebled product cannot be compensatory or remedial; because the fact of the extent of plaintiff's damages has been found by a jury, and under Amendment VII to the Constitution this fact cannot be re-examined.

In constitutional law it is the substance and effect of a given statute which must be tested against the Constitution, and not merely its form. The substance and effect of the trebling provision of this statute is to impose punishment for a public offense. It was so stated by the authors of the Act at the time of its original enactment. It has been so interpreted in connection with the application of the federal income tax laws, in connection with determining whether the action survives against a dead defendant, and otherwise.

As a means of inflicting punishment for a public offense, the basic unconstitutionality of the statute is under Article II of the Constitution, which gives the power to execute the laws of the United States, including the right

to grant reprieves and pardons for offenses against the United States, exclusively to the President of the United States, and gives the President alone the power to commission officers of the United States. This statute, by its terms, gives a part of the presidential power of executing the laws to a random plaintiff who is not commissioned by the President, and deprives the President of the power to grant a pardon for the offense. If one crime can be punished by this type of civil action, so can any crime, and then all crimes, so that the President need not fulfill his constitutional function of enforcing the laws at all, and law enforcement becomes wholly retributive, as it was at the dawn of civilization.

By casting the statutory method of imposing punishment for the commission of a federal crime in the mold of a civil action the statute unconstitutionally finesses a number of the protections guaranteed by the Bill of Rights to a citizen threatened with such punishment, including those dealing with double jeopardy, self-incrimination, deprivation of property without due process, right to jury trial, prohibition of excessive fines, and the requirement of oaths for search warrants. The constitutional absurdity of inflicting punishment for a criminal offense by a civil action, as this statute does, is demonstrated by hypothesizing a statute authorizing a civil punishment *by incarceration*, rather than of punishment *by treble damages*. As punishments, the two are constitutionally indistinguishable.

Since the litigation depends in this Court as well as in the Courts below upon the constitutionality of this statute, this Court has no jurisdiction to take any action other than to dismiss the appeal.

(g) **Argument.**

1. **Constitutionality Clearly Before the Court.**

Considering the hundreds of millions of dollars which must have changed hands under this statute, it is almost inconceivable that the Supreme Court of the United States has never been asked directly to pass upon its constitutionality under these provisions; yet, so far as we have found, this is the case.* The statute is three-quarters of a century old, but neither its venerability nor the failure of generations of lawyers to challenge its constitutionality can shield it from the acid test of conformity to the Constitution when the point is properly presented.

It is true that the constitutionality of this statute is raised in this litigation for the first time in this Court; yet the respondent was successful in the District Court and successful in the Court of Appeals, and under uniform interpretations of appellate procedure a respondent may urge any ground upon which this Court can affirm the judgment challenged by an appellant or petitioner. *Jaffke v. Dunham*, 352 U. S. 280, 77 S. Ct. 307, 1 L. Ed. 2d 314. This is because the question before this Court is whether or not the judgment appealed from was correct. The propriety of the ground upon which the Court below decided the case is not a subject of inquiry. *Davis v. Packard*, 31 U. S. 41, 6 Pet. 41, 8 L. Ed. 312.

Jurisdiction of the United States Courts, including this Court, over this action, can arise only from the grant thereof by Congress in 15 U. S. C. 15. If the statute is unconstitutional, the judgment for the defendant below is correct, and this Court has no jurisdiction to disturb it.

Therefore, before assuming the jurisdiction to answer the Question Presented in the Petition of whether the

* *Chattanooga P. W. v. Atlanta*, *infra*, p. 14, considered only (and only passingly) the legality of compensatory damages.

case should be reversed and remanded, this Court must first determine the constitutionality of 15 U. S. C. 15.

The constitutional obligation of the Court to examine every properly challenged enactment against the Constitution was never more effectively explained than in the closing paragraphs of the opinion of *Trop v. Dulles*, 356 U. S. 86, 78 S. Ct. 590, 599-600, 2 L. Ed. 630:

"In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

"We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights . . .

"The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

"When it appears that an Act of Congress conflicts with one of these provisions, we have no choice

but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case."

2. Form Versus Substance in Constitutional Law.

Central to the application here of the quoted constitutional provisions is whether the object of the treble damages statute is *to inflict punishment*. That is, in the sense of the Constitution: does the statute impose *jeopardy* (Amendment V) of *punishment* or a *fine* (Amendment VIII) for an *offense* against the United States (Art. II, Sec. 2 and Amendment V, Cl. 2)? Is a proceeding under it *any criminal case* (Amendment V, Cl. 3)? Are the safeguards which due process imposes upon sanctions by the sovereign applicable to such a proceeding (Amendment V, Cl. 4)? Is the legislative scheme of enforcing the criminal laws by random civil suits for more than actual damages a usurpation of the President's exclusive executive authority, including his authority to pardon; and does it make of the treble damage plaintiff an *officer of the United States* without presidential commission (Art. II, Secs. 2, 3)?

In form the action is a civil suit. In the numbering systems commonly employed in the District Courts the Court number is preceded by the letter "C" rather than

“CR”; the first pleading is called a “complaint”, not an “information” or “indictment”; the rules of civil rather than criminal procedure are applied, etc.

But in constitutional law no proposition is more firmly founded than that it is the substance of the action which controls, not its form.

By the language of a unanimous court in *Trop v. Dulles*, 356 U. S. 86, 94, 95, 78 S. Ct. 590, 594, 595, 2 L. Ed. 630, this Court has made this clear. The Court held (l. c. 595):

“The constitutional question posed by Section 401 (g) would appear to be whether or not denationalization may be inflicted as a punishment, even assuming that citizenship may be divested pursuant to some governmental power. But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it ‘technically is not a penal law.’ How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! Manifestly the issue of whether Section 401 (g) is a penal law cannot be thus determined.

* * * * *

“In form Section 401 (g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that ‘a person shall lose his liberty by committing bank robbery,’ though in form a

regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance."

This is not a new thought.

In 1878 this Court wrote in *Burgess v. Salmon*, 97 U. S. 381, 385, 24 L. Ed. 1104:

"The cases cited hold that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."

In *U. S. v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246, 249, this Court held:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

And, following *Chouteau*, in *U. S. v. La Franca*, 282 U. S. 568, 1 c. 572, 575, 51 S. Ct. 278, 280, 281, 75 L. Ed. 551, this Court held:

"A 'tax' is an enforced contribution to provide for the support of government; a 'penalty', as the word is here used, is an exaction imposed by statute as punishment for unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such . . .

“But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action.”

In *Giaccio v. Pennsylvania*, 382 U. S. 399, 402, 86 S. Ct. 518, 520, the Court held:

“Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the single label a State chooses to fasten upon its conduct or its statute. So here this state act whether labeled ‘penal’ or not must meet the challenge that it is unconstitutionally vague.”

In *U. S. v. Witherspoon*, 211 F. 2d 858, 860, 861, the Court held:

“[1,2] We are of the opinion that the action is one for penalties. A statute is penal where the purpose is to punish an offense against the public justice, as distinguished from an action affording a private remedy for injury by a wrongful act; the word, ‘penalty’, strictly and primarily denotes punishment, imposed and enforced by the state, for an offense against its laws.

* * * * *

“[3] ‘By damages is understood the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory, such damages are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, in-

flicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery.' ”

It may be that respondent will attempt to distinguish this statement of the law from the procedure here challenged because of the phrase “enforced by the state” in the expression “primarily denotes punishment, imposed and enforced by the state.” Respondent may argue that the penalty of the treble damage section is enforced not by the state or nation, but by the action of a private citizen. If he does so argue, we point out that this court has expressly held, in *Shelley v. Kraemer*, 334 U. S. 1, 21, 68 S. Ct. 836, 845, 92 L. Ed. 1161, that *the granting of judicial enforcement* in private litigation constitutes enforcement by the state, for constitutional purposes. It said:

“We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand.”

In *U. S. v. Dickerson*, 168 Fed. Supp. 899, 902, Judge Holtzoff, foreshadowing *Application of Gault*, 35 L. W. 4399, 87 S. Ct. 1428 expressed the idea in the following powerful words:

“Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and the essence of the proceeding, rather than its title.”

Basically, this was the reasoning which prompted this court to require Fourth Amendment search warrants to support building and fire ordinance inspections in *Camara*

v. San Francisco and in *Lee v. Seattle*, 35 L. W. 4517, 4522, June, 1967. The effect upon the householder was the same, the court concluded, whether the entry was in a criminal investigation or in an effort to avoid unsafe building conditions:

This rule of substance over form in constitutional law is equally applicable in the consideration of State action.

In *New York Times v. Sullivan*, 376 U. S. 254, 277, 84 S. Ct. 710, 724, 11 L. Ed. 2d 686, this Court said:

“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.”

In considering the constitutionality of this statute, we must, therefore, address ourselves to its substance and effect, and not its form.

3. The Substance of Treble Damage Awards.

An action for damages is for compensation: i. e., restoration, as nearly as possible, to the status quo ante. Such an action is not for punishment.

“There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law.” *Chattanooga F. & P. Works v. Atlanta*, 203 U. S. 390, 27 S. Ct. 65, 66.*

This is exactly what Congress did in enacting 15 U. S. C. 15 (a), reading:

“Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the anti-trust laws it may sue therefor in the United States District Court for the district in which

* In this opinion the validity of the trebling of the damages afforded by the statute was not discussed.

the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover actual damages by it sustained* and the cost of suit."

But this is not the power exercised by the Congress in enacting Section 7; for instead of the phrase "and shall recover actual damages by it sustained", the challenged section says: "and shall recover threefold the damages by him sustained."

15 U. S. C. 15 reads:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover threefold the damages by him sustained*, and the cost of suit, including a reasonable attorney's fee."

The cobwebs obscuring the critical differences between the two types of recovery sanctioned by 15 U. S. C. 15 and 15 U. S. C. 15 (a) are brushed away in the opinion of *Fay v. Parker*, 53 N. H. 342 (1872), as follows:

"A synonym of *damage* (when applied to a person sustaining an injury) is *loss*. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage—in French, *dommage*; Latin, *damnum*, from *demo*, to take away—signifies the thing taken away,—the lost thing, which a party is entitled to have restored to him so that he may be made *whole* again.

"Damage, we remarked, is derived from *demo*, to take away; and therefore it is not derived from *punio*, to punish.

“When used to signify the money which a plaintiff ought to recover, damage is never, nor in any sense, synonymous with nor collateral to the terms example, fine, penalty, punishment, revenge, discipline, or chastisement.

“Loss or damage sustained—the thing taken away—may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage.

“It is just as easy to call things by their right names as by wrong names, and it is better to be correct than careless in our speech.”

Thus 15 U. S. C. 15, unlike 15 U. S. C. 15 (a), is not,—as to the double and treble awards,—damages, i. e., compensation, recompense, remedy.

Then what is it, *in substance*? By logic, by history and by judicial interpretation, it is *punishment*.

4. Logical Approach.

The word “damages” in the statute, in the language of logic, is a *general* term. It means “all damages”. Indeed, the verdict, in this type of case, is only for the amount of the plaintiff’s damages. It is the Court, not the jury, that does the trebling. The charge in this very case so instructed the jury (T. 130):

“That is the amount of damages as you find from the evidence in the case is reasonably necessary to compensate the plaintiff for any injury to his business or property proximately caused by one or more of the violations of the antitrust laws which you find the defendant has committed.”

If we treble all the plaintiff’s damages, the trebled product cannot *also* be all the plaintiff’s damages. Three

times one is three, not one. Indeed, if one were to seek to steer around the constitutional infirmities by arguing that the trebled damages are not a penalty, but are compensatory, he would necessarily pile up on the reef of the Seventh Amendment:

“... no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.”

The extent of the plaintiff's damages is tried and determined by the jury's verdict. If the Court-trebled judgment be regarded, for constitutional treatment, as plaintiff's *damages*, then the Court has substituted its own (more properly, Congress's) finding of plaintiff's damages for that found by the jury, an action impermissible under the Seventh Amendment.

The trebled verdict has to be, in all logic, plaintiff's damages, plus a penalty, fixed by the statute at twice the amount of damages, and attorneys' fees.

5. Legislative Intent.

It happens that the intent of Congress in originally enacting Section 7 is preserved with extraordinary explicitness in the Congressional Record. Vol. 21, Part 4, Congressional Record, 51st Congress, pp. 3146, 3147; also 3149.

In *Haskell v. Perkins*, D. C., N. J., 28 F. 2d 222, 223, reversed on other grounds, 3rd Cir., 31 F. 2d 53, cert. den. 279 U. S. 872, 73 L. Ed. 1007, 49 S. Ct. 513, the Court summarized this record as follows:

“... the trebling of the damages and the addition of an attorney's fee can be regarded in no other way than as a burden laid upon an alleged wrongdoer by way of penalty or punishment.

“The records of the introduction and passage of this act have been made available, and it is interesting, in connection with this dispute, to pursue the account of proceedings in the Senate and House at the time the Sherman Act, so called, was made law. Apparently an argument was precipitated through an effort made by a Senator from Texas, who offered an amendment to provide that under this section suit might be brought, not only in the federal courts, but alternatively in any state court, and during the course of the debate which ensued Senator Hoar, of Massachusetts, who was in charge of the bill, and who probably was in large measure the author of the same in its final form, spoke as follows, regarding this very section 7:

“What I wish to point out to the Senate and to the Senator from Texas is this: This section, which is proposed to be amended, is a section establishing a penalty, threefold damages. Now, you cannot clothe a state court with the authority to enforce a penalty. If we create a legal right like a debt by a United States statute, then undoubtedly a state court of general jurisdiction, which has authority to enforce and aid in the collection of debts, without express enactment by the Congress of the United States, would sustain an action to recover that debt . . .

“But, when you come to penalties, no court enforces penalties except those created by the authority which creates the court, and no statute of any foreign or other authority but that can clothe the court with that power. . . . We might perhaps say that a person who owed to another a sum of money under an obligation solely the creature of a statute of the United States might recover in any state court; and if the obligation were created he could recover it

equally, whether he said so or not: but we cannot say that a state court shall be clothed with jurisdiction to enforce a claim for threefold damages suffered, which is purely penal and punitive.'

"And at that point Mr. Morgan, Senator from Alabama, asked the following question: 'And the attorney's fee?' To which Mr. Hoar replied: 'Yes; and the attorney's fee. So I submit to my honorable friend from Texas that his amendment, though intended in the same direction as the bill is intended, will not bear examination.'

"There is much of the same nature in the further consideration of this law as set forth in the congressional proceedings, and from it there is no other conclusion to be drawn than that Senator Hoar, of Massachusetts, Senator Morgan, of Alabama, and Senator Edmunds, of Vermont, all of them eminent lawyers, regarded the trebling of damages and the attorney's fee as constituting a penalty."

To this we might add only the comment of Senator George of Mississippi on the introduction of the Sherman Act (*ibid.* p. 1771):

"The bill is a proposition for the enactment of a penal or criminal statute. It does nothing but inflict penalties, either by civil or criminal procedure."

6. Judicial Interpretation.

A federal tax is imposed upon income. If a litigant recovers back what was formerly his own, or its equivalent in damages, he is regarded as not having realized income. Cf. *Fay v. Parker*, *supra*, 53 N. H. 342. It is possible that he may claim to have suffered a bodily loss, as of a leg, or a capital loss, as, in Albrecht's claim, the loss of a part of a route which he paid for. In either such case,

damages which he may recover for such a loss are not taxable [Bodily injury: 26 U. S. C. 104 (a) (1) and (2); capital: *Farmers' and Merchants' Bank v. C. I. R.*, 59 F. 2d 912]; on the theory that in neither case does the taxpayer receive *gain*, but merely gets back even.

It is possible that the litigant may be damaged by loss of profits, in which case the recovery of damages in lieu of lost profits will be taxed as income, as the profits themselves would have been. *Phoenix Coal Co. v. C. I. R.*, 231 F. 2d 420.

And it is also possible that the litigant may recover treble damages under the antitrust laws. If such so-called damages were actually damages, that is, compensatory, they should not be taxable. But the Commissioner of Internal Revenue has always treated them not as compensation, but as gain. And the Courts have upheld him.

In *C. I. R. v. Obear-Nester Glass Co.*, 217 F. 2d 56, the Court stated the issue as follows:

"The only question before us is whether or not punitive damages awarded under the federal antitrust acts constitute gross income . . ."

Holding that they do, the Court reasoned as follows (l. c. 61-62):

"The respondent suggests that by allowing the taxation of treble damages awarded under the antitrust acts, we would be defeating Congress' attempt to encourage the prosecution of violators of these acts. The first answer to this contention is that once it is established that the award involved here is income and comes within the coverage of Section 22 (a), Congress must specifically provide for its exclusion or deduction by statute if it so desires. We might further say that the principal purpose of treble dam-

ages seems to be punishment which will deter the violator and others from future illegal acts. Compensation for actual damages is enough to encourage legal action, not to mention the substantial amount of punitive damages the injured party still retains after taxes are paid.

“Respondent’s argument works against it, for if, as respondent suggests, punitive damages were intended principally to encourage the uncovering of anti-trust violators, then it might be said that the taxpayer ‘earned’ the punitive damages by prosecuting the action for the recovery. If this interpretation were made, the punitive damages here would fall within the *Eisner v. Macomber* definition as gain derived from labor.”

Certiorari was denied, 348 U. S. 982, 75 S. Ct. 570, 99 L. Ed. 764, and 349 U. S. 948, 75 S. Ct. 870, 99 L. Ed. 1274. In this instance the denial of certiorari takes significance from the circumstances that this Court had shortly before rendered its opinion in *C. I. R. v. Glenshaw Glass Co.*, 348 U. S. 426, 75 S. Ct. 473, 99 L. Ed. 483, which decided the same issue.

In *Glenshaw* (l. c. 428, 475):

“ . . . the parties concluded a settlement of all pending litigation, by which Hartford paid Glenshaw approximately \$800,000. . . . it was ultimately determined that, of the total settlement, \$324,529.94 represented payment of punitive damages for fraud and anti-trust violations.”

Holding these amounts taxable income, the Court held (l. c. 431, 477):

“Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion. The mere fact that the pay-

ments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients."

What is this if not a declaration by the Chief Justice for a unanimous Supreme Court that it is a fact that double and treble damages under 15 U. S. C. 15 are *extracted from wrongdoers as punishment for unlawful conduct?*

In *Sun Theatre Corp. v. RKO Radio Pictures*, 7th Cir., 213 F. 2d 284, 287 (1954), the Court held:

"The statute is explicit; the only remedy provided therein is 'threefold the damages' sustained. Giving to this language its plain meaning, we think the only permissible interpretation is that the remedy afforded is treble damages, penal in nature and susceptible therefore to all restrictions surrounding an action of such nature. The remedy has been so treated by this court in *Bigelow v. RKO Radio Pictures, Inc.*, 7 Cir., 150 F. 2d 877, reversed on other grounds, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652, wherein the court said, 150 F. 2d at page 882: 'The amount of this verdict was required by statute to be trebled by the judgment. In this respect neither the jury nor either court had any discretion. The verdict should represent actual damages sustained, and two-thirds of the judgment is a penalty which Congress has seen fit to impose . . .'"

In *Rogers v. Douglas Tobacco Board of Trade*, 5th Cir., 244 F. 2d 471, 483 (1957), cert. den. 361 U. S. 833, 80 S. Ct. 85, 4 L. Ed. 2d 75, the Court held:

"Trebling of the damages seems to us to be in the nature of a penalty for the public wrong . . ."

In *Englander Motors, Inc. v. Ford Motor Co.*, 186 Fed. Supp. 82, 85 (1960), the Court held:

"It appears that federal authorities in general treat a Section 4 action as one both remedial and penal or punitive in nature. Judge Learned Hand expresses it in this manner:

" 'The remedy . . . is not solely civil; two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose.' *Lyons v. Westinghouse Elec. Corp.*, 2 Cir., 222 F. 2d 184, at page 189, certiorari denied, 1955, 350 U. S. 825; 76 S. Ct. 52, 100 L. Ed. 737.

* * * * *

"The total recovery which any aggrieved litigant receives is arbitrarily computed, using actual loss only as a base. Undoubtedly, one of the prime purposes in allowing recovery three times the amount of actual damage was to encourage private enforcement of the anti-trust laws, and for this purpose Congress could have decided upon any percentage of the verdict as a penalty superimposed. That Congress settled on three times the actual damage is of no moment here.

"The essential nature then of a treble damage action under the Clayton Act, as we construe the numerous decisions on the subject, is one which grants an aggrieved party actual damages as a compensatory or remedial recovery, and then imposes a penalty by tripling the actual damage as a deterrent against violations of the anti-trust laws, when otherwise such violations might well go undetected and unprosecuted by the government itself."

The question has arisen whether a treble damage action under this section survives the death of the wrongdoer, upon the principle that actions for recompense survive; actions for punishment do not.

It was solved in *Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471, 483 (1957), cert. den. 361 U. S. 833,

80 S. Ct. 85, 4 L. Ed. 75, by a judgment of Solomon, unjustifiable under the explicit wording of the statute, but pragmatic. The judgment was divided into thirds. The double and treble awards were vacated. The Court held:

“[7] Combinations in restraint of trade or tending to create or maintain a monopoly gave rise to causes of action at common law. As we noted in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir., 214 F. 2d 891, 893, however, public injury alone justifies the threefold increase in damages.

“[8] The policy of the federal statement, we think, requires the survival of the cause of action to the extent that actual damages may be recovered. Trebling of the damages seems to us to be in the nature of a penalty for the public wrong, and we do not think that the personal representatives would be liable for more than actual damages. A different result would not be required even if the question were determined by the law of the State of Georgia.

“The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.”

Accord: *Haskell v. Perkins*, 28 F. 2d 222.

By logic, by legislative intent, and by judicial interpretation, the concept of treble damages is, for purposes of constitutional application,—i. e., in “essence” (in Judge Holtzoff’s phrase) or in “substance” (in the Chief Justice’s phrase),—“*purely penal and punitive*” (in Senator Hoar’s phrase), “and inevitably presupposes a punitive purpose” (in Judge Learned Hand’s phrase).

In a word, the double and treble judgment imposed by the statute is not damages at all: it is PUNISHMENT.

7. The Developing Constitution.

Because treble damages were known to the pre-constitution common law of England, we should remind ourselves that the United States Constitution was not adopted to enshrine the English common law, but to pick and choose from it, and that our Constitution itself is a developing document, retaining its basic ideas, but adapting the manifestation of these ideas to contemporary political morality.

In *Bartkus v. Illinois*, 359 U. S. 121, 127, 79 S. Ct. 676, 680, 3 L. Ed. 2d 684, this Court said that the Due Process clause

“... was intended to be a flexible concept, responsive to thought and experience—experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be enfolded by a process of ‘inclusion and exclusion.’ ”

In *Trop v. Dulles*, 356 U. S. 86, 78 S. Ct. 590, 598, 2 L. Ed. 630, the Court held:

“The [Eighth] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

In *Griffin v. Illinois*, 351 U. S. 12, 20, 21, 76 S. Ct. 585, 591, Justice Frankfurter, concurring, said:

“ ‘Due Process’ is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of ‘due process’ nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy.”

Among the “evolving standards of decency” is the belief that private vengeance—the code duello, the feuds

of the Hatfields and the McCoys, the letters of marque and reprisal,—are relegated to a less civilized past, and that punishment is the prerogative of the sovereign, and of the sovereign alone.

In the Encyclopedia Britannica article "Punishment" (11th Ed., Vol. XXII, p. 653), appears the following:

"... The progress of civilization has resulted in a vast change alike in the theory and in the method of punishment. In primitive society punishment was left to the individuals wronged or their families, and was vindictive or retributive: in quantity and quality it would bear no special relation to the character or gravity of the offense. Gradually there would arise the idea of proportionate punishment, of which the characteristic type is the *lex talionis*, 'an eye for an eye.' The second stage was punishment by individuals under the control of the state, or community; in the third stage, with the growth of law, the state took over the primitive function and provided itself with the machinery of 'justice' for the maintenance of public order. Henceforth crimes are against the state, and the exaction of punishment by the wronged individual is illegal (cf. Lynch Law) . . ."

To the same effect are these sentences from U. S. v. National Lead Co., 332 U. S. 319, 338, 67 S. Ct. 1634, 1643, 91 L. Ed. 2077:

"This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, is effective and fair enforcement, not punishment."

Basically, what is wrong with 15 U. S. C. 15 is that it delegates at random the *power to punish*, which in a civilized society is the right and duty of the State, and of the State, alone. To coin a phrase, it attempts to create a *Private Criminal Law* in a constitutional system which

assigns the whole power of punishment to the Government itself, under rigid safeguarding limitations.

Recompense, remedy, compensation, damages: all these an injured plaintiff may properly recover in his own right. Vengeance? No. Vengeance is Mine, saith the Lord. Rom. 12, 18.

Is this not the reason, despite the contractual injustice, that *The Merchant of Venice* is a comedy? Shylock is entitled to the repayment of his loan. Plus interest. Plus costs. Plus attorneys' fees, mayhap. But a pound of flesh? Oh, villain!

The law of today finds its counterpart to the moral of *The Merchant of Venice* in the rule that liquidated damages in a contract is legitimate only if it does not really amount to a penalty. See discussion in *Sun Printing & Pub. Assn. v. Moore*, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366.

This was the basis of the decision in *Rex Trailer Co. v. U. S.*, 350 U. S. 148, 151, 76 S. Ct. 219, 221, 100 L. Ed. 149, in which the Court said:

"Liquidated-damage provisions, *when reasonable*, are not to be regarded as penalties (citing authority) and are therefore civil in nature."

An action for damages caused by a wrong is a civil case. And no matter how we may camouflage it, for constitutional purposes, an action to punish an offense is a criminal case.

This, in effect, is what Justice Brandeis held for a unanimous court in the case of another *Albrecht v. U. S.*, 273 U. S. 1, 8, 47 S. Ct. 250, 252, 253, 71 L. Ed. 505, when he said:

"A person may not be punished for a crime without a formal and sufficient accusation . . . Where

there was an appropriate accusation either by indictment or information a court may acquire jurisdiction."

Let us now set the treble damage section against specific constitutional provisions.

8. Double Jeopardy.

" . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

15 U. S. C. 15 is premised upon a finding of the commission of an "offense" thus: it predicates an injury by "anything forbidden in the antitrust laws." Things forbidden in the antitrust laws are misdemeanors. 15 U. S. C., §§ 1, 2, 8, 13a. By definition, a misdemeanor is an offense.

There could be no clearer case for *sameness* than in the case at bar; because defendant has been *autrefois acquit* by the jury's verdict below of having committed something forbidden in the anti-trust laws, i. e., of violating 15 U. S. C. 1, with respect to the acts alleged in the complaint. What petitioner is seeking here is a *retrial* of the very same offense on the same complaint, for error in the first trial in which defendant was found not guilty. This, in an action for punishment, is constitutionally forbidden.

We therefore need not consider, for the application of the double jeopardy clause to this suit the somewhat narrow distinctions, made in cases involving a civil trial for liquidated damages, following a criminal trial for punishment, which mark the narrow line between such cases as *Rex Trailer Co. v. U. S.*, 350 U. S. 148, 76 S. Ct. 219, 100 L. Ed. 149, and *U. S. ex rel. Marcus v. Hess*, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443, on the one side, and *U. S. v. La Franca*, 282 U. S. 568, 51 S. Ct. 278, 75 L. Ed. 551, on the other.

But for completeness, we should point out again here that actions under 15 U. S. C. 15, as to the double and triple recovery are not by any stretch of the imagination actions for liquidated damages—they are, as to the double and triple recovery, *for punishment*, by all criteria. This necessarily throws cases upon 15 U. S. C. 15 on the La Franca side of the line.

A remand of this case looking toward any result than a judgment for defendant would put the defendant in jeopardy for a second time of being *punished* for the same offense against the United States, of which it was *autrefois acquit* in an identical proceeding.

9. Self Incrimination.

“ . . . nor shall be compelled in any criminal case to be a witness against himself . . . ”

One of the consequences of casting in the form of a civil action a proceeding for the imposition for a penalty is that the rules of civil procedure, rather than those of criminal procedure, are applied.

Defendants in such a case as this are bound to give depositions, to answer interrogatories under oath, to admit facts and the genuineness of documents and to produce for inspection and copying documents and other evidence in their possession. Various penalties are imposable by Rule 37, F. R. C. P., for refusal on the part of such a defendant thus to incriminate himself, *including* 37 (b) 2 (iii), the imposition of *judgment by default*.

This constitutional provision is by its terms applicable only “in any criminal case”. But have we not a criminal case where, as we have seen, the object of the proceeding is to inflict punishment for an offense against the United States?

Then, is not the sanction of a default judgment (short of torture) the very ultimate of compulsion? *If you don't give evidence against yourself, you will be denied a trial and punished just as if you had been found guilty.*

If the authorization of random civil treble damage suits is a constitutionally acceptable method of inflicting punishment for violations of the anti-trust laws, it has to be equally proper for punishing violations of any other law, and of all laws. A lazy or a cheap government could in this wise avoid the trouble of prosecuting any crimes, letting all laws be enforced by proxy. Under such a scheme the guaranty against self-incrimination is reduced to an abstract and useless platitude, by a chicane.

10. Trial by Jury.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

Petitioner's "Question Presented" poses a violation of the Act "as a matter of law." Pet. 2. He complains of the failure of the trial court to sustain his motion for judgment n. o. v. on the ground that the facts showed a violation as a matter of law of Section 1 of the Sherman Act. Pet. 10. In his Court of Appeals brief (Br. 36) plaintiff's initial and principal point was:

"The District Court erred in Not Sustaining Plaintiff's Motions for Summary Judgment, for a Directed Verdict and for Judgment Notwithstanding the Verdict."

Such relief is possible in appropriate circumstances in a civil trial.

In a criminal trial in a federal court, however, such relief is not constitutional under the Sixth Amendment.

The leading authority on this subject is *U. S. v. Taylor*, 11 Fed. 470, Cir. Ct. Kans. 1882, which, though cited many times, has never been criticized or overruled.

The Court said (l. c. 471, 472):

“It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.

“The constitution does not deal with the form, but with the substance, the essence, of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.

“It is doubtless true that, in a certain sense and, to a limited extent, this doctrine makes the jury the judges in criminal cases, of both law and fact; but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

“It has accordingly long been well settled that, while the court is the judge of the law and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never, to my knowledge,

been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substantially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is in effect a decision by the court, upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty, or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instructions of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court."

In 1965 this holding was cited in a footnote to the opinion in *Byrd v. U. S.*, 342 F. 2d 939, 942, Dist. Col. Cir., as "holding that the judge can never direct a verdict of guilty no matter how conclusive the evidence."

And in 1965 it was cited with approval by the Supreme Court in *Singer v. U. S.*, 380 U. S. 30, 31, 32, 85 S. Ct. 783, 788, 13 L. Ed. 2d 630.

As we have seen, to the extent of two-thirds of the recovery, this is an action for the punishment of a public offense. In substance, to this extent, it is a criminal prosecution.

The Bill of Rights is written from the standpoint of the defendant. What cares he whether the prosecution is denominated "civil" or "criminal", if it is to impose punishment upon him for the violation of a crim-

inal statute, and if the same Marshal satisfies the judgment for that punishment by an identical Levy issued out of the same Court against the same property?

The only relief petitioner seeks here is a judicial determination by the Court, independent of the jury, that the defendant did, as a matter of law, violate Section 1 of the Sherman Act, and must be punished therefor; the jury only to fix the penalty.

The relief petitioner seeks is violative of the Sixth Amendment of the Constitution, and since this enactment of Congress would authorize such relief, it must be unconstitutional.

11. Excessive Fines.

“ . . . nor excessive fines imposed.”

We have seen that this is an action for punishment of a public offense by exacting the payment of money as a penalty.

This is the very definition of a fine.

Century Dictionary, Fine, 5:

“The exaction of a money payment as a punishment for an offense . . .”

Webster's New International, Fine:

“ . . . a certain payment of money imposed as punishment for an offense.”

Oxford English Dictionary, Fine, sb. 8 b:

“A certain sum of money imposed as the penalty for an offense.”

Is the fine provided by 15 U. S. C. 15 *excessive* in the constitutional sense?

The provision doubtless has for its father the statute of 1 William & Mary, Ch. 2, *Martin v. Johnson*, 11 Tex. Civ. App. 633. This statute gives little elucidation to the meaning of "excessive". But the grandfather of the provision is doubtless clauses 20, 21 and 22 of the Magna Carta of 1215. These do illuminate the provision. They read (Adams & Stephens, *Select Documents of English Constitutional History*, 45):

"20. A free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold; and a merchant in the same way, saving his merchandise; and the villain shall be fined in the same way, saving his wainage, if he shall be at our mercy; and none of the above fines shall be imposed except by the oaths of honest men of the neighborhood.

"21. Earls and barons shall only be fined by their peers, and only in proportion to their offence.

"22. A clergyman shall be fined, like those before mentioned, only in proportion to his lay holding, and not according to the extent of his ecclesiastical benefice."

Fines, said the barons at Runnymede, may be imposed only: "in proportion to the measure of the offence"; "in proportion to the magnitude of the offense"; "in proportion to their offence."

But the fine imposed by 15 U. S. C. 15 bears no relation whatever to the magnitude of the offense. It is tied arbitrarily to the plaintiff's damages. Two plaintiffs may suffer damages from the very same violation of the anti-trust laws. One may have suffered \$1.00 damages; another \$1,000.00. The fine imposed in the one case is

one thousand times that imposed in the other. The magnitude of the offense is the same in each case because it is the same offense in each case.

Or, assume there are two defendants, one which designed, proposed and carried out the offense, and imposed the conspiracy by some duress upon the other, whose part was purely passive. Because the fine is tied solely to the plaintiff's damages, and because of the rule of joint liability of joint tort feasons, both defendants, the relative magnitude of whose offenses may be as one thousand to one, must each pay the identical fine.

Some cases have sanctioned different fines according to the wealth of defendants; as in the case of the clergyman. (Magna Carta 23) or as in the case of the paradox of "punitive damages". It may be doubted whether this criterion is constitutionally permissible in itself;* but not even such a criterion as this is employed under 15 U. S. C. 15. Be the defendant a millionaire or a pauper, viciously criminal or merely passive, his fine is to be twice the damages that plaintiff can prove, and neither more nor less. Neither court nor jury has any discretion as to the amount of the punishment, nor is the amount of the fine ascertainable from the reading of the statute. The amount of the fine under the statute is not set by the statute, nor given, with or without criteria, to the discretion of the jury or the judge. It is left wholly to hazard.

The fine explicitly provided by Section 1 of the Act is \$50,000—the largest fine for any offense on the books by a good deal.

But in this case there is sought a fine of \$232,000 (two-thirds of \$348,000, T. 13); and in the electrical and motion-picture anti-trust cases the fines sought soared into the hundreds of millions of dollars.

* Griffin v. Illinois, 351 U. S. 12, 16, 76 S. Ct. 585, 595.

Where Congress sets the maximum fine at \$50,000, is not a statute which sets a fine for this identical offense in such random terms, that it may come to an amount limited only by the timidity of plaintiff's counsel and the mercy of an outraged jury, one which imposes an excessive fine?

12. Search Supported by Oath.

"... no warrant [for search or seizure] shall issue but upon probable cause, supported by oath or affirmation."

Under (or preliminary to) a forthrightly criminal form of prosecution for violation of Section 1 of the Sherman Act, the government would have no right to search for evidence on the premises of the defendant except pursuant to a warrant issued on a showing of probable cause supported by oath or affirmation.

It may be argued that the showing of "good cause" of Rule 34, F. R. C. P., is the constitutional equivalent of "probable cause" in the Fourth Amendment, although some doubt may be cast on this by the "serious probable cause question" posed respecting the "reasonable ground" requirement of the statute in *Berger v. New York*, 35 L. W. 4649, 4652. It may also be argued that the "designating" in the court's order under 34 F. R. C. P. is the constitutional equivalent of the "particularly describing" requirement of the Fourth Amendment, although the broad scope permitted by the proviso of Rule 26 b may not meet the amendment's demands.

But there can be no dispute that an order for inspection under Rule 34 F. R. C. P. does not require that the showing be *supported by oath or affirmation*, an absolute requirement of the Fourth Amendment.

Albrecht v. U. S., 273 U. S. 1, 5, 47 S. Ct. 250, 251, 71 L. Ed. 505.

Thus the effect of casting in the form of a civil proceeding an action for punishment for the commission of a crime is to make the rules of civil procedure applicable, and thus to subvert the protection of the Fourth Amendment. As 15 U. S. C. 15 does this, it is unconstitutional.

13. Due Process of Law.

Due Process of Law in the Fourteenth Amendment includes within its concept all of the other constitutional guarantees we are dealing with, insofar at least* as those guarantees are:

“... implicit in the concept of ordered liberty ...”

Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288.

By 1965 Justice Goldberg was able to summarize in his concurring opinion in *Pointer v. Texas*, 380 U. S. 400, 411, 412, 85 S. Ct. 1065, 1072, 13 L. Ed. 2d 923 as follows:

“Thus the Court has held that the Fourteenth Amendment guarantees against infringement by the States the liberties of the First Amendment, the Fourth Amendment, the Just Compensation Clause of the Fifth Amendment, the Fifth Amendment’s privilege against self-incrimination, the Eighth Amendment’s prohibition of cruel and unusual punishment, and the Sixth Amendment’s guarantee of the assistance of counsel for an accused in a criminal prosecution.”

If Due Process of Law means all this in the Fourteenth Amendment, it must mean as much in the Fifth.

Thus *prima facie* the denial by this statute of the specific rights discussed in our brief constitutes also a dep-

* We say “at least” because the appellant’s arguments in *Palko* may yet become the law. Cf. *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

rivation of due process. But due process is broader than this. It is a "*constitutional promise of a fair trial.*" ✓
Griffin v. Illinois, 351 U. S. 12, 17, 76 S. Ct. 585, 590, 100 L. Ed. 891.

In the particular we would now urge upon the Court, Due Process means that a statute declaring or punishing a wrongful act must give the citizens, with reasonable accurateness, fair warning both of the nature of the act and of the consequences of violating it.

In Connally v. General Construction Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, this Court held:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . ."

In Giaccio v. Pennsylvania, 382 U. S. 399, 402, 403, 86 S. Ct. 518, 520, 521, the Court held:

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."

Almost universally, statutes fixing fines do so by expressing the maximum, and usually also the minimum, within which court or jury shall exercise its discretion.

Consequently, we have found no cases expressly holding that definiteness of penalty (within *some* limits) is a requisite of due process. Yet the concurring opinion of Mr. Justice Stewart in *Giaccio v. Pennsylvania*, 1. c. 405, and 522, reads the court's opinion as serving:

"... to cast grave constitutional doubt upon the settled practice of many states to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense."

And the author of the note in 1966 *Duke Law Journal* 792, 799 argues:

"This language [*Giaccio*, *supra*] might indicate that guidelines must be furnished to limit the jury's discretion in differentiating conduct deserving of a lesser penalty from conduct deserving of a greater penalty. Otherwise the conduct for which the defendant might be punished (through an increase in sentence) would be undefined, and the jurors' determination would reflect *their* definition of what constitutes punishable conduct."

Also, if due process truly does embrace protections which are "implicit in the concept of ordered liberty," it embraces the prohibition of *ex post facto* laws, which was considered by the drafters of the Constitution so important as to be included not once, but twice, and not in the ten amendments, but in the body of the Constitution (Art. I, Sec. 9, par. 3; Sec. 10, par. 1).

Now the *ex post facto* provisions prohibit not only an after-the-fact definition of the offense, but also an after-the-fact increase of the penalty. *Thompson v. Utah*, 1898, 170 U. S. 343, 351, 18 S. Ct. 620, 42 L. Ed. 1061.

It is true that the formula for the penalty of 15 U. S. C. 15 was not increased after the commission of the acts

in issue here, and that the statute cannot be claimed to be literally *ex post facto*. Yet the prohibition of the *ex post facto* clauses is held to include the requirement that a citizen be able to learn, before he takes a given step, not only what is a crime, but what is the penalty for committing it.

If it be constitutional for a statute not to express any penalty, or, as here, to express it in terms of a formula containing variables over which neither wrongdoer nor court nor jury can have any control, then what is the sense of a constitutional prohibition against increasing such a penalty? If the wrongdoer cannot know what the punishment may turn out to be—if the blue sky is the limit, so to speak—how is he helped by a prohibition against increasing the penalty?

So if the statutory formula for the penalty to be imposed for the commission of a given crime is so vague or so dependent upon uncontrollable factors that the extent of the punishment simply cannot be determined in advance, the policy of fairness required by due process will make the statute unconstitutional.

This statute adds to the \$50,000 specific fine imposable for a violation of the anti-trust law, an additional fine, the amount of which could never be anticipated, even "within an order of magnitude", as the physicists say. Because of the retroactive applicability of the rule of proximate cause, the amount of damages recoverable for a wrongful act may be totally unimaginable at the time the wrong is done. The punishment provided by this statute for its violation (in addition to the \$50,000) is an amount which is two times an unknowable (the amount of damage), times another unknowable (the number of persons to be injured). This may be just and reasonable as far as the recovery of actual damages is concerned. But because of the statutory relation of the punishment, not

to the crime itself, nor to the "magnitude of the offense"—but to the damages which result therefrom, the amount of the punishment imposed by this statute is purely casual, and hence capricious. It takes property without due process of law.

14. Executive Prerogative.

Article II:

Sect. 1: "The executive power shall be vested in a President of the United States of America."

Sect. 2: "The President . . . shall have power to grant reprieves and pardons for offenses against the United States."

Sect. 3: "... he shall take care that the laws be faithfully executed, and shall commission all officers of the United States."

In these days of waning Congressional power, vis-a-vis the President, it is an unusual thought that a statute is void because it takes constitutional authority away from the executive. True, the President has not complained.

But the defendant, as a constitutional person, has the constitutional right, when it is to be prosecuted for punishment for an offense, to require that the proceedings for its punishment be initiated and carried out by the appointed constitutional authority,—not by some person who might have a personal grudge. Indeed, considering that the class of person designated by the statute is limited to those who have been damaged by the very acts for which defendant is to be punished, and considering that the plaintiff must profit on his injury by two hundred per cent, the vindictive prosecution of the statutory scheme for punishment is not just a possibility, it is a built-in certainty. Yet a fair prosecutor is a part of the fair trial required by Due Process. *Miller v. Pate*, 35 L. W.

4179, 87 S. Ct. 785. And the Constitution puts the authority for executing and enforcing the laws in the President of the United States, and in him only.

This statute creates a *President by proxy* to hold part of the executive power and to fulfill the presidential obligation of seeing that the laws be faithfully executed. And the proxy President is appointed not by the elected President, and not really by Congress, but by happenstance.

Of course, the President may, and often must, act through agents. But in such cases it is the President himself who must commission them. Not Congress, nor the hazard of who happened to suffer damage, or claims that he did. Is not a plaintiff, insofar as he seeks to impose punishment for an offense against the United States, acting as an officer of the United States, just as a U. S. Attorney might do? If not, in whose right is he acting? And if he is *in substance* an officer of the United States, he must be commissioned by the President.

Lastly and most importantly, the Constitution gives the President the power to grant reprieves and pardons for offenses against the United States. This is a provision of the Constitution which a defendant, upon whom punishment (which might amount to hundreds of thousands of dollars) had been imposed under this statute, might find of some solace.

But the form of the proceeding laid down by Congress for the imposition of this punishment preempts this power. For the statute makes the penalty the property of the plaintiff (for no just reason) which, if valid, not even the President can take away. Pardoning Power of President, 5 Opinions, Attorney General, 579.

Again we say form must yield to substance. If the statutory scheme deprives a defendant of his constitu-

tional right to petition the President for a pardon from the penalty exacted for his offense, the statute, and not the Constitution, must yield.

15. Reductio Ad Absurdum.

If we grant, as we must, that two-thirds of the recovery authorized by the statute, 15 U. S. C. 15, is a penalty to be inflicted for a public offense, ceded by the sovereign to the random plaintiff, we find ourselves facing an absurdity:

Suppose this statute, instead of giving the civil suit, anti-trust; plaintiff his damages as recompense, plus double his damages as a penalty imposed upon defendant, had given such a plaintiff, in addition to his damages, the right to imprison the defendant for a year. Would this be constitutional? Hardly!

Yet it would not be unconstitutional as a cruel or unusual punishment. Imprisonment is no more a cruel and unusual punishment than is a fine.

Nor would it violate Amendment XIII, which prohibits involuntary servitude "except as a punishment for a crime." Defendant would have been found to have committed a crime.

Then why would it be unconstitutional? Only because, we say, such a statute would delegate to the private plaintiff, by a sort of letter of marque and reprisal, *the right to punish*,—a right reserved, by the Constitution, wholly and exclusively, to the President of the United States; and it would give this right free of the constitutional limitations imposed upon Government prosecutions.

One's instinctive conviction of the illegality of punishment by incarceration in a civil action is immediate, because incarceration cannot give the plaintiff compensation, any more than could Shylock's pound of flesh, and compensation is the only legitimate business of the civil law

of damages. Treble damages has escaped this intuitive revulsion because of the misleading use of the word "damages". If we once thoroughly recognize that two-thirds of the statutory grant is for punishment, and nothing else than punishment, we must reach the conclusion that it is to the imposition of *punishment as such* that the protection of the Constitution reaches. And if this be so, the concept of *private criminal law* implicit in this statute fails against the Constitution as readily where the action is for punishment by fine as where it is for punishment by imprisonment.

(h) Conclusion.

Since the statute is unconstitutional, it cannot support a recovery, nor confer jurisdiction upon this Court or the Courts below to impose a recovery in this case. The judgment below must be affirmed, or the petition for certiorari dismissed.

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No. **43**

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT.
Petitioner,

VS.

THE HERALD COMPANY a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Respondent's Motion to Dismiss.

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No: 975.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT.
Petitioner,

vs.

THE HERALD COMPANY a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Respondent's Motion to Dismiss.

I.

Respondent has knowingly waived any right it may have had to challenge the jurisdiction of the Court on the ground that 15 U. S. C., Sec. 15, is unconstitutional because it authorizes a private person to prosecute an alleged criminal action depriving the defendant therein of its constitutional protections in a criminal action. Rule 24 (2) provides that a respondent may not move to dismiss a petition for certiorari, and that objections to the jurisdiction of the court should be asserted in his brief

in opposition. The matters raised by Respondent in its Motion to Dismiss are raised for the very first time in this case. While former Rule 7 (3), third paragraph, provided that after a writ of certiorari was granted a respondent might move to dismiss the writ for reasons not already advanced in opposition to the granting of the writ, the present Rules contain no such provision. In any event, such a motion as Respondent has filed would be available only when there are new or newly discovered facts which indicate that the writ should not have been granted. This is clearly not the case here. This is not a case of belatedly pointing out a clear and recognized constitutional obstacle to jurisdiction. It is instead an attempt to change a long recognized and accepted rule of constitutional law by resort to a contrived and tenuous argument.

The key to respondent's argument is that damages beyond actual compensation convert the civil suit by a private individual into a criminal action to vindicate the public interest by punishment. This Court, in the term just concluded, stated that "the Constitution presents no general bar to the assessment of punitive damages in a civil case," *Curtis Publishing Co. v. Butts, ... U. S. ...*, 87 S. Ct. 1975, 1994, citing *Day v. Woodworth*, 13 How. 363, 370-71, 14 L. Ed. 181. *Day* was decided in the December Term, 1851. At that early date the Court said that "repeated judicial decisions for more than a century" left no doubt, despite the questions raised by some writers, that punitive damages could be granted in a civil case. *Ibid.*, at p. 271. The statute in the patent laws providing for the court to increase up to three-fold the actual damages found by a jury was on the books at the time, and the Court said:

By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages,

inflicted by way of penalty or punishment, given to the party injured. *Ibid.*, at p. 371.

If a rule of constitutional law established for well over a hundred years and reaffirmed by this Court only last month is to be overturned it should not be on a motion to dismiss a grant of certiorari. Neither should it be raised in any other way in this proceeding. Petitioner-Plaintiff, a former home-delivery newspaper carrier deprived of his livelihood by the actions that are the subject of this suit, is ill-matched in financial resources against the large newspaper corporation that as Respondent-Defendant, now seeks to introduce at the last minute a constitutional bar to liability for its admitted actions.

However, if the Court finds that the constitutional claim raises a jurisdictional issue that must be decided in this case, Petitioner-Plaintiff strongly prefers to have the issue decided on this motion, as remand for trial of this issue would be oppressive to him.

II.

Respondent is not entitled to prevail on the merits in this motion. Logic may protect the granting of damages for punishment in a civil action. But the experience of the law has often been to accomplish desired ends by reasonable means at the expense of logical purity.

At common law punitive or exemplary damages have always been recoverable in a civil action. Until modern times this was true because the jury's determination of the amount of damages was as final and arbitrary as its decision on the facts. Sedgwick, *Damages*, 9th ed., § 349. After development of the principle that in general damages are compensatory, punitive damages could still be recovered in a civil action but they were limited to

certain kinds of cases. *Ibid.*, § 350; McCormick, Damages, § 77.

This court held more than a hundred years ago, and again last month, that the constitution is not a general bar to recovery of punitive damages in a civil action. **Day v. Woodworth**, *supra*; **Curtis Publishing Co. v. Butts**, *supra*. It specifically recognized legislative authority to provide new rights to recover punitive damages in civil actions when it upheld an Alabama statute creating employer liability for deaths caused by an employee's negligence. **Pizitz Co. v. Yeldell**, 274 U. S. 112, 47 S. Ct. 509, 71 L. Ed. 952.

It is true that in the recent libel cases the constitutionality of punitive damages was assumed by all parties, so that the Court's reaffirmance does not rest on full re-examination based on full briefs and arguments. However, full examination of punitive damages in civil cases was recently undertaken by the House of Lords on the basis of briefs and extensive arguments. **Rooke v. Barnard** [1964], A. C. 1129 (H. L.). The case was brought by a draftsman dismissed by B. O. A. C. because of the threat of fellow workers to strike in breach of an agreement, unless he was fired. The dismissed employee sued the union members who made the strike threat for the tort of intimidation and recovered £7,500 on a direction that deliberate illegality might be punished by exemplary damages. The Court of Appeals reversed on the ground that a threat to break a contract could not give rise to the tort of intimidation. The case went to the House of Lords on cross appeals, where it was a case of first impression on the exemplary damages issue. On this issue Lord Devlin spoke for all their lordships. After reviewing all the cases cited and argued, he said:

These authorities convince me of two things. First, that your Lordships could not, without complete dis-

regard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognize the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. *Ibid.*, at pp. 1225-1226.

Lord Devlin then set out 3 categories in which exemplary damages were approved. These were (1) oppressive, arbitrary or unconstitutional action by a governmental officer; (2) action calculated to make a profit for the defendant in excess of compensation payable to the plaintiff, and (3) express authorization by statute.

Abuses of the principle of exemplary damages can be avoided by constitutional limitations on certain types of liability, as in libel cases against public officials or public figures. **New York Times Co. v. Sullivan**, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686; **Rosenblatt v. Baer**, 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 597; **Time, Inc. v. Hill**, 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456; **Curtis Publishing Co. v. Butts**, *supra*.

The distinction is easily made between the civil case in which punitive damages are awarded to a private litigant and a criminal action. It turns on the right asserted, rather than the remedy applied. This test is used by the federal courts for removal purposes. "A suit brought by and for the sole benefit of an individual to recover a penalty or damages, including punitive, is civil in nature, although recovery may help the state in vindicating its public policy." *Moore's Fed. Prac.* 2d ed., Par. 0.157 [4.-2]. This Court has stated that Congress recognized the different interests of the public and of injured persons and provided a variety of actions against anti-

trust violators so that each interest could be protected by appropriate proceedings, including criminal or civil suits by the Government, and private suits for injunctions or treble damages. In reversing a District Court refusal to grant the Government an injunction against an anti-trust violator already under a decree in a private action covering the same actions, this Court said:

“The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. **Federal Trade Comm’n v. Cement Institute**, 333 U. S. 683, 694—695 (1948). ‘. . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.’ **United States v. Bendix Home Appliances**, 10 F. R. D. 73, 77 (S. D. N. Y. 1949).”

United States v. Borden Co., 347 U. S. 514, 518-519, 74 S. Ct. 703, 98 L. Ed. 903.

This Court has also held that the antitrust laws protect individuals against injuries resulting from acts prohibited by the antitrust laws even if the public interest in competitive prices and practices is in no way harmed. **Klor’s, Inc. v. Broadway-Hale Stores, Inc.**, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741; **Radiant Burners, Inc. v. Peoples Gas Co.**, 364 U. S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358; **Simpson v. Union Oil Company of California**, 377 U. S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98. In these situa-

tions it is absolutely clear that in seeking treble-damages plaintiff is acting to vindicate his own interests and cannot possibly be said to be suing "in the right of the United States for the violation of a criminal statute." (Respondent's Motion, p. 5.)

Respondent contends on page 5 of its Motion that this Court considered "only passingly" the issue of the legality of compensatory damages in **Chattanooga Foundry and Pipe Works, et al. v. City of Atlanta**, 203 U. S. 390, 27 S. Ct. 65. Suffice it to say that this Court considered the issue sufficiently to make plain that the entire foundation on which Respondent rests its argument for the granting of its Motion to Dismiss is completely without substance. The cited case was a suit to recover treble damages for a violation of the antitrust Act (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3202), and this Court held that a statute of limitations for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise" does not apply to the treble damages provision of the anti-trust act. Similarly, Respondent's entire argument that 15 U. S. C. 15 is unconstitutional because it imposes "punishment for the commission of a federal crime in the mold of a civil action," thus violating Article II and various provisions of the Bill of Rights, must fall for each of a valid premise. Respondent's contentions clearly lack merit.

CONCLUSION.

Respondent waived any right to raise a constitutional defense to this action by not raising it in time. The Federal Rules do not permit Respondent to raise such issue at this time or in the manner attempted. Respondent's motion is not meritorious. It rests on the premise that a punitive remedy makes any action a criminal one to vindicate the public right. This is not the case. Punitive damages in civil cases have long been provided

by common law and by statute, serve a proper purpose in modern law in general, and in particular the treble-damage provision of the antitrust laws is directed to vindicating distinct, identifiable, private interests. The motion to dismiss should be denied.

Respectfully submitted,

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Certificate of Service.

State of Missouri, }
County of St. Louis. } ss.

I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 25th day of July, 1967, I served two copies of the foregoing Brief in Opposition to Motion to Dismiss on the Respondent as required by Rule 33, by personally mailing said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

Donald S. Siegel,
Member of the Bar of the United
States Supreme Court.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No.

43

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 975.

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The District Court entered judgment without an opinion on May 13, 1965 (R. 131-132). The opinion of the Court of Appeals for the Eighth Circuit, published at 367 F. 2d 517, is reprinted in the Record, pp. 145-159.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 20, 1966 (R. 159). On November 7, 1966, the Court of Appeals stayed its mandate pending petition for certiorari (R. 160). This Court al-

lowed the writ on February 27, 1967 (R. 161). The jurisdiction of the Supreme Court rests on 28 U. S. C., Sec. 1254 (1).

QUESTION PRESENTED.

Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent-merchant carriers in order to induce him to comply with its suggested resale price and then terminating sales to him for his continued refusal to agree to comply are in violation of Section 1 of the Sherman Act.

STATUTES INVOLVED.

Section 1 of the Sherman Act (26 Stat. 209; 50 Stat. 639; 69 Stat. 282; 15 U. S. C., Sec. 1), provides that:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . .”

Section 4 of the Clayton Act (38 Stat. 731; 15 U. S. C., Sec. 15), provides that:

“Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.”

STATEMENT OF CASE.

This is a resale price maintenance case brought by a home delivery carrier against his newspaper supplier under Section 1 of the Sherman Act (R. 1-7). The complaint alleged that The Herald Company, sometimes hereinafter called the "Globe-Democrat", violated the anti-trust laws by fixing and maintaining the prices at which independent contractors, called newspaper carriers, could resell The Herald Company's newspaper, the St. Louis Globe-Democrat, and by terminating its carrier relationship with the carrier Albrecht by means of and pursuant to an unlawful combination, or because of Albrecht's refusal to comply with the Globe-Democrat's resale price policy.

It was admitted by Defendant in its Answer that Plaintiff is an individual engaged in the business of operating a newspaper carrier route known as St. Louis Globe-Democrat Route No. 99 in the County of St. Louis, Missouri, since June 1, 1956 (R. 1, 10); that the Globe-Democrat Publishing Company, a Missouri corporation, was liquidated on December 29, 1963, and its assets and liabilities transferred to and assumed by Defendant, The Herald Company, a New York corporation, which is doing business as Globe-Democrat Publishing Company in the City of St. Louis, Missouri, and elsewhere, said business consisting of the publishing and selling of a daily newspaper known as "St. Louis Globe-Democrat" in said City and State, as well as outside of said State, and that Defendant is engaged in commerce as defined in Section 12 of Title 15, U. S. C. A., and is engaged in activities affecting commerce (R. 1, 2, 10).

It was further admitted in the Answer that Defendant and the Globe-Democrat Publishing Company for a long period of time prior to June 1, 1956, and up to the pres-

ent time, caused the St. Louis Globe-Democrat newspaper to be delivered to its subscribers in the Greater Metropolitan St. Louis Area by means of a system of carriers, and for the purpose of distributing and delivering its newspaper, divided said area into certain districts, commonly called routes, and has sold, given, or approved and authorized the sale to various paper carriers, including Plaintiff, of such routes, lists of subscribers within said routes, certain rights and privileges and the good will of the business of such newspaper carrier routes (R. 2, 10); that Plaintiff as the operator of Route 99 has, since June 1, 1956, and up to the time of the instant lawsuit, purchased St. Louis Globe-Democrat newspapers from Defendant at wholesale, without the right to return any newspapers so purchased, and sold said newspapers at retail to numerous customers within said Route, with whom Plaintiff had entered into separate agreements to deliver to each of them the St. Louis Globe-Democrat, and that from the time Plaintiff purchased said Route, he faithfully performed all of his duties as a carrier of Defendant's newspaper, promptly paid all monies due Defendant, and had established a substantial and profitable business (Par. 6, R. 3, 10).

It was further admitted in the Answer that Defendant and the Globe-Democrat Publishing Company (hereinafter sometimes referred to collectively as "the Publisher") have followed a practice for many years up to the present time, of publishing in its newspaper the Publisher's "suggested retail prices" for delivery by carriers of its newspapers to customers (Par. 7, R. 3, 10); and that the Publisher has followed the practice for many years up to the present time, of requiring that carriers of Defendant's newspaper sell the St. Louis Globe-Democrat to subscribers at prices no higher than the Publisher's "suggested retail prices" (Par. 8, R. 3, 11).

A count of tortious interference with business relations was dismissed before trial (R. 20, 141). The trial court denied plaintiff's motion for summary judgment on the issue of liability (R. 19). At trial the defendant did not controvert the facts, but won a jury verdict (R. 102, 131-132, 142). The trial court entered judgment on the verdict and overruled a motion for judgment n. o. v., or for a new trial (R. 131-132, 137-138). The Court of Appeals for the Eighth Circuit affirmed (R. 159) 367 F. 2d 517. This Court granted certiorari (R. 161).

Petitioner was, from June 1, 1956, to October 31, 1964, the home delivery carrier of the St. Louis Globe-Democrat newspaper on Route 99 in a suburban area comprising part of Kirkwood, Missouri (R. 1, 28, 48-49). He bought Route 99 from the previous carrier and sold to another that part of the Route remaining to him after the incidents involved in this suit (R. 22, 50-52).

Respondent is a corporation which publishes the St. Louis Globe-Democrat, a morning newspaper circulated in Illinois and Missouri by mail and by home delivery routes (R. 1-2, 82-83). Until 1961, the relationship between the newspaper and its home delivery carriers was regulated by a collective bargaining agreement (R. 53-54). On February 16 and 17, 1961, the Business Agent of St. Louis Newspaper Carriers' Union No. 450, wrote G. D. Bauman, Business Manager of the newspaper, advising him that the carrier contract would terminate May 26, 1961, and inviting negotiations for a new contract. On May 16, 1961, Mr. Bauman replied that on advice of counsel the newspaper took the position that home delivery carriers are not employees but independent merchants; that it could not negotiate with the carriers about the pricing policy, which must be determined unilaterally by it; that a threatened strike by the carriers would be considered by the newspaper to be a boycott by a group of merchants

and that redress would be sought by actions for treble damages under State and Federal antitrust laws (R. 53-55).

On May 26, 1961, the contract between the newspaper and the carriers' union expired and was not renewed (R. 54, 58).

In Mr. Bauman's letter of May 16, 1961, to the Business Agent of the carriers, and in a policy statement issued to all carriers and received by Petitioner, the newspaper stated that it would announce a suggested retail price to subscribers and if a carrier charged more it would refuse to sell newspapers to him, or would terminate his exclusive right to sell "the Globe-Democrat by home delivery in his territory," but he would be given 60 days within which to sell his route to a satisfactory carrier (R. 54, 60). The suggested retail price was published daily in an ad in the paper (R. 29-30).

Beginning in 1961, the newspaper increased its suggested retail price per month for home delivery of the daily paper from \$1.30 to \$1.60, and continued the \$1.60 suggested price at all subsequent times. Petitioner charged his customers on home delivery Route 99 the suggested \$1.60 price if they paid in advance, but otherwise, he charged \$1.70 (R. 32, 33). He had few customers who paid in advance (R. 33).

In 1961, and again early in 1962, Walter I. Evans, the Circulation Director of the newspaper, telephoned Petitioner, saying that he had information that Petitioner was charging \$1.70 rather than the suggested \$1.60, and warning him that the newspaper could not tolerate that, and Petitioner would have to charge the suggested price (R. 34, 35). Petitioner replied that he was an independent merchant, received no pension or vacation payments from the newspaper as an employee would; and that he would set his own price (R. 34).

On June 1, 1962, Mr. Evans wrote Petitioner protesting his \$1.70 price, and warning that if he persisted, "we will take whatever legal steps appear to be necessary to effectuate our position" (R. 35). Following receipt of that letter, Petitioner had a meeting with Circulation Director Evans and Business Manager Bauman in Evans's office, at which he was told that the newspaper would have to control the retail price; that they could not tell Petitioner what to charge, but if he charged more than the suggested retail price, they did not have to do business with him; and that Petitioner should not use a "bill" which had a price of \$1.70 printed on it (R. 36-37). Petitioner continued to charge \$1.70 for the daily paper (R. 38).

The Globe-Democrat was delivered to homes on 165 to 173 routes (R. 83-84). Throughout the period from May 26, 1961, when the Union contract expired, to May 20, 1964, the newspaper took no action against any of the home delivery carriers to secure compliance with its suggested retail price, except to contact carriers whose subscribers had called attention to the fact that they were charging more than the suggested price and request them to comply (R. 87). Over the three-year period prior to May 20, 1964, Petitioner lost about six subscribers as a result of charging \$1.70 instead of the publisher's suggested \$1.60 (R. 38). On May 20, 1964, Petitioner had 1,201 daily subscribers (R. 38).

On May 20, 1964, the newspaper sent Petitioner a letter, signed by Circulation Director Evans and composed with the assistance of Business Manager Bauman (R. 8, 97). The letter informed Petitioner that the newspaper had received and referred to him "a large number of complaints" from his customers that he was charging more than the publisher's suggested price, and continued:

"The system we customarily follow of respecting, as exclusive, territories of our carriers prevents the

normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of over-pricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves, or for resale by another carrier, at the lower prices in the over-priced territory.

"In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter" (R. 8).

The policy statement referred to was first issued in 1959 with reference to independent news dealers. Bauman's letter of May 16, 1961, stated that it also applied to carriers. On May 24, 1962, it was reissued and made specifically applicable to home delivery carriers (R. 55-60). The territories were exclusive only as to other home delivery carriers. Petitioner, as well as other carriers, had competition within his route from store sales, street racks, and street corner salesmen, who also made some home deliveries (R. 26-27, 52, 72, 82).

The enclosed letter informed addressees that readers who subscribe "through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price." It further stated the amount of the suggested price, and invited completion and return of an enclosed card which would authorize the Globe-Democrat to make delivery at the suggested price. The letter was signed by Circulation Director Evans (R. 9, 10).

The letters were mailed out to the residents on Petitioner's route, and were followed by telephone and door-to-door solicitation by Milne Circulation Sales Corporation, under contract with the newspaper (R. 41-43, 61-70). This solicitation asked persons paying "the extra price"

if they wanted to "get the paper at the regular price" (R. 66). Milne had done circulation solicitation for the Globe-Democrat for 4 or 5 years, but had never based such solicitation on an inquiry as to the carrier's compliance with suggested retail price (R. 66). The Globe-Democrat had never taken this kind of action against any other carrier (R. 87). It had *no dissatisfaction* of any kind with Petitioner's performance of his services as a home delivery carrier, except his pricing (R. 88-89, 95-96). Business Manager Bauman said that he wished other carriers would perform their work as well as Petitioner (R. 96). The only reason for soliciting the customers of Petitioner by the described means was admitted by Evans to be to maintain the publisher's suggested retail price (R. 88).

The result of the solicitations was subjection of Petitioner to angry epithets, opprobrium and serious loss of income, with little decrease in expenses (R. 41-42). He lost more than 300 of his 1,201 daily customers (R. 41, 44-47). On June 12, 1964, nineteen days after the solicitations began, Petitioner lowered his price from \$1.70 to the suggested retail price of \$1.60, in order to keep his remaining customers (R. 45-46, 49).

The newspaper used makeshift means to make deliveries to the customers it had solicited away from Petitioner. It owned no equipment for home deliveries, and had no employees for this purpose (R. 84-87). It had not been in the carrier business; did not want to be in it and had no thought of making a profit from delivering to Petitioner's former customers (R. 84, 96-97). Temporarily, employees with other duties made the deliveries, using their personal cars (R. 91). Early in July, the newspaper advertised for a carrier to deliver to the customers it had taken away from Petitioner (R. 75). John Kroner, a carrier on another Globe-Democrat route, applied for and was

given the list of former customers of Petitioner on his Route 99, which was designated a new Route, with the number "198", although the newspaper had not more than 173 routes (R. 71-76, 83-84, 99-100). The right to serve these 300 customers was given to Kroner without charge (R. 72-73, 92, 99). Circulation Manager Charles B. Cleaver stated that he told Kroner he could have the profit of serving these customers; that it was uncertain how long he could deliver to them, that these customers had been taken from Albrecht for overcharging; and that he reminded Kroner of the newspaper's resale price policy (R. 99-101). Kroner testified he was told that he might have to give back the customers if Petitioner Albrecht sold "the route," or if "Albrecht got straightened out with the Globe-Democrat" (R. 76-77).

On July 27, 1966, Petitioner met with Business Manager Bauman, in his office. Bauman said the customers would be given back to Petitioner if he would agree to charge no more than the suggested retail price (R. 47, 96). Petitioner refused; saw his attorney, and this action was filed August 12, 1964 (R. 1, 47). On August 21, 1964, in a letter signed by Evans, the newspaper notified Petitioner "that your appointment as carrier is terminated," but he would be given 60 days to sell his route to a person whose credit, experience and efficiency was acceptable to it (R. 48-49). This period was subsequently extended from October 21 to October 31, to simplify billing, which is usually on a monthly basis (R. 49).

Eugene Schwarzenbach offered Petitioner \$24,000.00 for Route 99 (R. 50). On September 15, 1964, Schwarzenbach and Albrecht met with Evans, Cleaver and Bauman to see if the publisher would approve the prospective purchaser. Bauman told Schwarzenbach that he would not be buying the 300 subscribers on Route 99 turned over to Kroner as "Route 198," and that new subscriptions 'phoned

in to the newspaper would be given to Kroner on "Route 198," unless Petitioner dropped the suit and bought back the customers from Kroner—in which case Petitioner could sell to Schwarzenbach or could operate it himself if he would agree to charge the suggested retail price (R. 50-51). After this meeting, Schwarzenbach agreed to and thereafter did purchase Petitioner's part of Route 99 for \$12,000.00 (R. 51-52, Plaintiff's Exhibit 12, App. B). On December 1, 1964, Schwarzenbach bought the "Route 198" customers from Kroner for \$3,600.00 (R. 80).

SUMMARY OF ARGUMENT.

The undisputed facts clearly show that the Globe-Democrat, entwining with itself a circulation sales company, Albrecht's customers, and another home delivery carrier, brought pressure upon Albrecht to comply with its suggested resale price by means that went far beyond prior announcement and mere declination, and that this additional pressure did overcome Albrecht's independent judgment and cause him to comply.

The Court of Appeals' suggestion that the acts were not coercion because they were "legal competition" was not even seriously argued by the Globe-Democrat, and the facts overwhelmingly show that the Rest. of Torts, § 709 standard of bona fide competition was not met and this basis of immunity from tort liability is not available to the Globe-Democrat.

The undisputed facts clearly show that termination was for failure to agree to comply in the future with the Globe-Democrat's resale price arrangement. The arrangement being unlawful there can be no doubt that the termination was unlawful.

The Court of Appeals was in error in holding that the home delivery carrier business is outside the sweep of the general rule that price fixing, of a minimum price or a maximum price, is a *per se* offense.

The only question at issue is whether an unlawful combination in violation of Section 1 of the Sherman Act was created and maintained by the actions of the Globe-Democrat and the persons it entwined with it. If "common purpose" is a necessary element of "combination" it was present in the relationships between the Globe-Democrat, the circulation sales company, some of

Albrecht's customers, and the other carrier. However in resale price maintenance cases an unlawful "combination" can consist of an antagonistic-coercive relationship between the seller, not acting in agreement, concert, or common purpose with anyone, and the buyer. Such a "combination" is created, as a matter of law, whenever the seller goes beyond prior announcement and mere declination to sell and uses other means to effect adherence to his suggested resale prices. This is the law of the **Parke, Davis** case. This view of "combination" is absolutely necessary if the purpose of the Sherman Act is to be accomplished in resale price maintenance cases. The newspaper industry furnishes an example of the evil that would result from holding that "common purpose" is a necessary element of "combination."

The trial court erred in refusing to grant summary judgment, or judgment n. o. v. for Petitioner, and by including a requirement of "common purpose" in its jury instruction on "combination" and refusing to give instructions stating the **Parke, Davis** rule. The judgment below should be reversed and the court directed to enter judgment for Petitioner Albrecht on the matter of liability and hold a new trial to determine the amount of damages.

ARGUMENT.

I.

The Undisputed Facts Clearly Show Coercion, Termination in Furtherance of Resale Price Maintenance, and Restraint of Trade.

The facts in this case as presented by plaintiff Albrecht were undisputed, and, in fact, largely admitted by the Globe-Democrat. The facts clearly show:

1. Resale price maintenance by coercion.
2. Termination for refusal to promise future compliance.
3. Restraint of trade.

1. Resale price maintenance by coercion.

The Globe-Democrat wrote to Albrecht's customers and hired Milne Circulation Sales Corporation to telephone them and call on them door-to-door. The customers were told Albrecht was overcharging and were solicited to leave Albrecht and accept delivery from another at the newspaper's suggested retail price (R. 8-10, 41-43, 61-70). These actions forced Albrecht to capitulate. For three years Albrecht had held to his own price, although repeatedly advised and requested by the Globe-Democrat to reduce his price to its suggested price (R. 38). After the solicitations started on May 20, 1964, Albrecht held out for only 19 days. On June 12, 1964, he lowered his price from \$1.70 a month for the daily paper to the suggested resale price of \$1.60 (R. 45-46, 49). He had lost over 300 of his 1,201 customers as a result of the solicitations, in addition to being subjected to personal abuse (R. 41-42, 44-47).

The Court of Appeals said of the Globe-Democrat's actions that "there was no coercion other than providing legal competition" (R. 155, 367 F. 2d 517, 524). This was not even seriously argued by the Globe-Democrat, in the face of the overwhelming facts to the contrary. The well-established rule of law is that taking custom from another is exempt from liability only when done pursuant to good faith competition, as shown by intent to gain profits for oneself and to continue in business for oneself and not just temporarily in order to injure another. Rest. of Torts, Sec. 709; **Tuttle v. Buck** (1909), 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599; **Package Closure Corp. v. Sealright**, 141 F. 2d 972 (C. C. A. 2, 1944). The fullest and most explicit admissions by the Globe-Democrat indicate that it had never been in the carrier business; did not want to be; had no equipment or employees for the carrier business; had no thought of making a profit from delivering to the customers it took from Albrecht; asserted no proprietary right in serving them; made delivery to them for only a short time on a make-shift basis and then gave them without charge to a carrier, Kroner, for whom it had advertised; and had the sole purpose of forcing Albrecht to comply with its suggested resale price (R. 71-76, 83-87, 91-97).

2. Termination for refusal to promise future compliance.

The 300 customers were given to Kroner on the understanding that he could serve them only temporarily and would have to give them back if Albrecht "got straightened out" with the Globe-Democrat (R. 76-77). On July 27, 1964, the Business Manager of the Globe-Democrat offered to return the 300 customers to Albrecht if he would agree to charge its suggested resale price (R. 47, 96). Albrecht refused and filed this suit on August 12, 1964 (R. 1, 47). The Globe-Democrat then terminated (R. 48-49). Officers of the newspaper said repeatedly that they

never at any time had any complaint about Albrecht except his pricing (R. 88-89, 95-96). On September 15, 1964, the Globe-Democrat told a prospective purchaser of Albrecht's route that he would not receive the 300 customers turned over to Kroner and would not receive new subscriptions telephoned in to the newspaper office, unless Albrecht dropped the suit and bought the customers back from Kroner—in which case Albrecht was told he could continue to operate the route if he would agree to charge the suggested resale price (R. 50-51).

At every point the Globe-Democrat was acting to maintain its suggested resale price. Respondent admitted that it and Milne Sales solicited the customers and potential customers of Albrecht because he was charging more than the Globe-Democrat's suggested retail price, and in order for the newspaper to maintain its suggested retail price (Admitted in Defendant's Answer, R. 11, and see R. 3, 4, 8-10, in Defendant's Answers to Interrogatories 14 and 15, R. 81, and in the admissions of Defendant's Circulation Director, Evans, at R. 87, 88, 92). The termination had this same purpose, and was explicitly used as a bargaining lever for resale price maintenance. It was well within the time period of coercion for that single purpose. Even after the Globe-Democrat advised Albrecht that he was terminated and that it would not sell him papers after sixty days, and when Albrecht came in to obtain the required approval of the newspaper of the proposed purchaser of his route, the Globe-Democrat still attempted to coerce Albrecht to resume delivering papers as the regular carrier on Route 99, provided he would drop his lawsuit against the newspaper and would charge no more than the newspaper's suggested retail price (R. 50, 51). Regardless of what rights a supplier has to terminate his dealings with a customer, he cannot legally do so for the reason that the customer will not comply with an unlawful arrangement. **Simpson v. Union Oil Co.**, 377 U. S. 13, 16.

Clearly, termination herein was unlawful where, as here, the Globe-Democrat's resale price maintenance activities constituted an unlawful arrangement.

3. Restraint of trade.

The Court of Appeals said that the facts do not show a restraint of trade because the newspaper's actions did not hinder but fostered competition (R. 152, 367 F. 2d 517, 522). There are no unique facts about the home delivery carrier business that would justify removing it from the pervasive sweep of this Court's rule that to fix a price is to restrain trade, without regard to the effect on competition or whether the price is held down supposedly for the benefit of the consumer. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150; **Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.**, 340 U. S. 211.

In the first place, the Court of Appeals assumed, quite incorrectly, that the home delivery carrier faced no competition within his route and but for the actions of the newspaper herein would be free "to mulct the public for all the traffic would bear" (R. 152, 267 F. 2d 517, 522). (For three years Albrecht had been charging 10¢ a month more than the suggested resale price.) The record clearly showed that Albrecht, as well as other carriers, had competition within his route from store sales, rack sales and street corner salesmen who also made some home deliveries (R. 26-27, 52, 72, 82).

Second, the Court of Appeals is quite wrong in its assumption that by the simple declination to sell, the newspaper would acquire the right to make home deliveries by its own employees and could become a complete monopolist on every route (R. 152, 367 F. 2d 517, 522). The routes are the property of the home carriers. The newspaper can decline to sell to the carrier, but the carrier still owns the right to deliver to the customers and he has the right to

sell the route even though he has been terminated (R. 54, 60). The newspaper would have to buy all the routes or else start from scratch as a genuine competitor in home delivery and work up its own customer list.

II.

“Common Purpose” Existed Among Those Entwined in Exerting Coercion.

The only question in this case is whether a “combination” in restraint of trade or commerce was created. Because the facts are undisputed, this is a question of law, and Rule 52 has no application. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 44. The substantive rule to decide the question also is to be found in **Parke, Davis**. The issue is whether a resale price maintenance “combination” requires the presence of a third person acting in concert and common purpose with the seller.

Plaintiff Albrecht took the position that Milne Sales Corporation, and the 300 customers, and the other carrier, Kroner, knew the purpose of the Globe-Democrat’s actions, and, therefore, did act in concert and common purpose with the seller, but that regardless of the presence of any third person or of his relationship to the newspaper a “combination” in violation of Section 1 of the Sherman Act came into existence as soon as the Globe-Democrat went beyond prior announcement and mere declination to sell, and used other means to bring pressure to bear upon Albrecht to get compliance with its suggested resale price.

Even if “common purpose” was required between the Defendant and third parties, it was present in this case. The admitted facts show, so clearly that reasonable men could not differ, that Milne Sales, Albrecht’s customers and Kroner did have a common purpose, or common pur-

poses, with the Globe-Democrat, to coerce Albrecht to follow the Globe-Democrat's resale price policy.

(a) Milne Sales had never previously called existing home subscribers of the Globe-Democrat for the purpose of urging them to leave a carrier and accept delivery by other means at the suggested retail price (R. 66). In order to make this kind of solicitation Milne Sales had to know and did know that the Globe-Democrat was coercing Albrecht to comply with its suggested retail price (R. 65, 66, 68, 90). Mr. Evans, Circulation Manager of the Globe-Democrat, testified that he gave Mr. McDowell, of Milne Sales, the information contained in the letter of May 20, 1964, which contained an appeal to those customers to leave Albrecht and accept delivery by other means at the Globe-Democrat's suggested retail price (R. 90). A reasonable person making such a solicitation of the customers of the carrier must know that a natural and probable result of such solicitation will be to increase the coercion on Albrecht to comply with the Globe-Democrat's resale price policy. So knowing, Milne Sales made the solicitation. One is held to intend the natural and probable result of his actions. Therefore, Milne Sales did have a common purpose and engaged in a concert of action with the Globe-Democrat to coerce Albrecht to comply with the Globe-Democrat's resale price policy and, therefore, Milne Sales and the Globe-Democrat formed an unlawful combination in violation of Section 1 of the Sherman Act.

(b) Albrecht's customers receiving such solicitation, called him and complained, and many stopped taking the paper from Albrecht, accepting the Globe-Democrat's offer, sometimes communicated through Milne Sales, to deliver the Globe-Democrat to them by means other than Albrecht, at the suggested resale

price (R. 41-43, 45, 69, 88, 89). From the solicitation itself, these customers knew that the Globe-Democrat wanted Albrecht to charge no more than the suggested resale price. Knowing this, the customers called and complained, or refused to pay more than the suggested resale price and stopped taking the paper from Albrecht (R. 41, 42). Anyone in this situation would know that the natural and probable consequences of these actions would be to increase the pressure on Albrecht to comply with the Globe-Democrat's resale price policy. So knowing, the customers did the acts of complaining, refusing to pay more than the resale price, or cancelling their subscriptions with Albrecht. One is held to intend the natural and probable consequences of his actions. Therefore, these customers of Albrecht did have a common purpose and did engage in a concert of action with the Globe-Democrat to coerce Albrecht to comply with the resale price policies of the Globe-Democrat and, therefore, these customers formed an unlawful combination with the Globe-Democrat, in violation of Section 1 of the Sherman Act.

(c) George Kroner knew that he was given the customers taken from Albrecht by means of such solicitation, and that this solicitation had occurred because Albrecht was charging more than the Globe-Democrat's suggested resale price (R. 73, 75, 77, 92, 93, 100, 101). Kroner was told by Mr. Cleaver, the Globe-Democrat's Circulation Manager, that he would have to give these customers back when Albrecht "got straightened out with the Globe-Democrat" (R. 76, 77). Knowing this, Kroner delivered to the customers taken from Albrecht by such solicitation, and also delivered to customers who were "new starts" given him by the Globe-Democrat on the route which had been Albrecht's exclusively (R. 79). Any person

in this situation would know that the natural and probable consequences of these acts of delivering papers to customers taken from Albrecht and new starts within his exclusive route, which were withheld from Albrecht, would result in increasing the coercion on Albrecht to comply with the resale price policies of the Globe-Democrat. So knowing Kroner did deliver to the customers taken from Albrecht by solicitation and withheld from Albrecht, within the exclusive route of Albrecht (R. 78-80, 92-94, 100, 101). One is held to intend the natural and probable results of his actions. Therefore, Kroner did have a common purpose with, and did enter into a concert of action with the Globe-Democrat to coerce Albrecht and, therefore, Kroner and the Globe-Democrat formed an unlawful combination in violation of Section 1 of the Sherman Act.

III.

The Supreme Court Has Held That "Common Purpose" Is Not a Necessary Element of Combination.

Plaintiff Albrecht relied on the **Parke, Davis** opinion. Therein, this Court said that if a seller does no more than announce a policy designed to restrain trade, and then declines to sell to those who fail to adhere to the policy, he has not put together a combination in violation of the antitrust laws. If the customer yields to the bare threat to terminate, the restraint of trade sought to be prevented is accomplished, but that result must be tolerated so "long as **Colgate** is not overruled." But "[w]hen the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of

the Sherman Act.” 362 U. S. 29, 44. This statement implies that there is no need for concerted action by the manufacturer together with a third person who shares a common purpose. It says if “he” goes beyond prior announcement and mere declination “he” has put together an unlawful “combination.” The necessary implication is that the other party to the combination is the unwilling and coerced customer.

The Court of Appeals for the Fourth Circuit clearly adopted this meaning in **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566 (1963). Explaining why a concerted action or common purpose is not necessary to a finding of unlawful combination under Section 1 of the Sherman Act, the Court declared:

“There is no indication in **Parke, Davis** or in any other case, that these principles regarding refusal to deal vary, depending upon whether there is a **monopoly** or **concerted action** with **co-conspirators**, or whether, on the other hand, there exists some other form of arrangement in restraint of trade. To the contrary, **irrespective of monopoly or conspiracy**, if the seller **pressures** his customers or dealers into adhering to resale price maintenance or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself out of the narrow protection afforded by **Colgate**” (Emphasis added). 324 F. 2d 566, 573.

The trial court herein overruled plaintiff’s motion for summary judgment (R. 19) and overruled plaintiff’s objection to a requirement of “common purpose” in the definition of “combination” and refused to give Plaintiff’s Requested Instructions 25, 26 and 27, which were in the language of the **Parke, Davis** opinion (R. 113, 119-120, 126). The District Court instead instructed the jury at R. 126 that:

“* * * in order to have a combination there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means * * *” (Plaintiff objected to this charge at R. 113).

The Court of Appeals affirmed, saying:

“Combination is usually defined as the union or association of two or more persons for the attainment of some common end. Globe-Democrat did not combine with anyone. Its action taken to provide competition to plaintiff was completely unilateral” (R. 154, 367 F. 2d 517, 523).

All other Courts of Appeals that have considered the question have held that an unlawful combination can consist of the seller and his coerced customer, without any necessity for a third party who joins the seller in concerted action and common purpose. **Englander Motors, Inc. v. Ford Motor Co.**, 267 F. 2d 11 (C. A. 6); **George W. Warner & Co. v. Black & Decker Mfg. Co.**, 277 F. 2d 787 (C. A. 2); **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566 (C. A. 4); **Lessig v. Tidewater Oil Co.**, 327 F. 2d 459 (C. A. 9). In the **Osborn** case, the Fourth Circuit said:

“It is clear . . . that if the seller imposes a trade restraining arrangement upon his customers, whether they be willing or reluctant, the seller has acted outside the protection of Colgate. Contrary to the theory adopted [by the court below] in the instant case, there need not be a concert of action among several sellers, or a conspiracy between the seller and customers who actively assist the seller in securing adherence to his policy of suppressing competition. If the arrangement or combination between the seller and his dealers is put together through the coercive tactics of the seller alone, this is sufficient.” 324 F. 2d 566, p. 574, n. 13 (Emphasis supplied).

IV.

The View That the Antagonistic-Coercive Relationship Between Buyer and Seller Can Constitute an Unlawful "Combination" Is Essential to Effecting the Purpose of the Sherman Act in Resale Price Maintenance Cases.

The view that an unlawful "combination" under Section 1 of the Sherman Act can consist of the coercing seller and his coerced customer whose will to charge his own price has been overcome has been adopted by this Court because it is the only view that will carry out the purposes of the Sherman Act in resale price maintenance cases. The genesis of competition is the competitive decision. Each economic entity should make production, distribution and pricing decisions on the basis of receiving the greatest benefit for itself in light of its own conditions of cost, location and market acceptance. These independent business decisions result in alternatives being presented to the consumer. The consumer's choices, based on securing the greatest benefit for himself, create the great pressure for economic efficiency that is the strength of the free market system.

If the flow of competitive decisions is threatened the whole system is in danger. The antitrust laws protect the free market system by prohibiting actions that seriously interfere with the flow of competitive decisions. The interference can result from voluntary renunciation by those who seek to benefit not through individual success in competition but through sharing in the fruits of price fixing or market division. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150; **United States v. Addyston Pipe and Steel Co.**, 6 Cir., 85 F. 271, aff'd 175 U. S. 211. The interference can result from depriving others of the right to make certain decisions, as in tying,

or all decisions, as in exclusion through monopolizing. **Northern Pacific Railway Co. v. United States**, 356 U. S. 1; **Standard Oil Co. of New Jersey v. United States**, 221 U. S. 1.

In resale price maintenance cases the facts show that some wholesalers and retailers sometimes voluntarily renounce their competitive pricing decision in the hope of monopoly profits, but others will not voluntarily renounce and are brought into line by the seller's depriving them of their independent pricing decision by a system for inflicting penalties that overcome the buyer's will. The voluntary renunciation is an easy case, but it is difficult to bring the deprivation case under Section 1 of the Sherman Act if all its categories of acts in restraint of trade—contract, combination, conspiracy—include an element of agreement, express or implied, or of concerted action for a common purpose.

The difficulty did not arise in the first resale price maintenance case to come before the Supreme Court. **Dr. Miles Medical Co. v. John D. Park & Sons**, 220 U. S. 373, was a suit by the drug manufacturer against a wholesaler who had been cut off for price cutting and who was obtaining supply from other wholesalers and from retailers by inducing them to breach resale price fixing contracts which they had voluntarily entered into. The suit was for an injunction to prevent tortious interference with contractual rights. The Supreme Court held that the demurrer was correctly sustained because the contracts were void because illegal under Section 1 of the Sherman Act. The relationship created by voluntary renunciation of the buyer's independent pricing decision and his willing entry into the price fixing contract was in issue. The relationship between the drug manufacturer and the wholesaler who was refused service because of price cutting was not in issue. 220 U. S. 373, at 381-382.

The next resale price maintenance case to reach this Court squarely raised, on its facts, the question of whether a combination in violation of Section 1 of the Sherman Act could arise from the deprivation of a buyer's independent pricing decision by coercive acts of the seller alone. **United States v. Colgate & Co.**, 250 U. S. 300. It was not alleged that any contracts were entered into by the soap manufacturer and its customers; or that the defendant acted in concert with other soap manufacturers, or with other than its own customers individually; or that the customers themselves entered into any combination or agreement with each other, or that the defendant acted with them other than individually. 253 Fed. Rep. 522, 524, 527. The manufacturer alone was indicted and was charged with knowingly and unlawfully creating and engaging in a combination with its wholesale and retail dealers to procure their adherence to its suggested resale prices in violation of Section 1 of the Sherman Act. 253 Fed. Rep. 522, 523.

The combination was alleged to have been formed and carried out by the following acts:

- (1) Distributing telegrams, lists, etc., of uniform resale prices;
- (2) urging the dealers to adhere to those prices;
- (3) informing them that defendant would refuse to sell to those who did not so adhere;
- (4) requesting them to inform it of sales at other prices;
- (5) discovering and investigating sales of that character;
- (6) placing the names of dealers who made such sales on "suspended lists";
- (7) requesting those dealers to give assurances and promises to adhere in future to the indicated prices;
- (8) refusing to sell to those dealers until they gave such assurances and promises;
- (9) selling to such dealers upon their giving such assurances and promises;
- (10) requesting such assurances and promises from new dealers when opening accounts; and
- (11) freely sell-

ing to those dealers who observed the indicated prices. 253 Fed. Rep. 522, 523.

The question so clearly raised by the facts in **Colgate** was not answered in the decision of that case. It was 1918 when the case was decided below and 1919 when it was decided by the Supreme Court. The prevailing attitude in the country was not averse to the concentration of decision making in the hands of the few. In 1920 this Court decided that a company that brought approximately 180 independent concerns under its control, extending to 80 per cent or 90 per cent of the steel production of the entire nation, was not in violation of Section 2 of the Sherman Act. **United States v. United States Steel Corp.**, 251 U. S. 417.

On a demurrer to the indictment the trial court in **Colgate** held that it did not charge a criminal offense under Section 1 of the Sherman Act. The Supreme Court by means of its reading of the trial court's interpretation of the indictment affirmed on the narrow ground that: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of the trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U. S. 300, 307. Attention was shifted from deprivation of the buyer's "independent discretion" to price to the seller's independent discretion to select his customers.

Colgate left unanswered the question of whether some kinds of actions by the seller alone can create an unlawful combination if those actions deprive the buyer of his independent price decision. The question was unequivocally answered by this Court in **United States v. Parke, Davis & Co.**, 362 U. S. 29. In the opinion of the

Court in **Parke, Davis**, Justice Brennan delineates the difficulty the Court had, in the resale price maintenance cases subsequent to **Colgate**, in giving up an exclusively consensual or conspiratorial rationale of Section 1 in the face of increasingly flagrant sets of facts of seller enforcement systems that overcame the will of the buyer and coerced him into combining with the seller by charging the dictated price. 362 U. S. 29, 39-43. The consensual or conspiratorial rationale finally had to yield to reality, and the **Colgate** doctrine of customer selection was limited to implementation only by prior announcement and mere declination. Any other conduct to secure resale price adherence was declared to be illegal—even if the other acts which secured adherence were wholly unilateral and not done in concert, common purpose, or agreement with others.

Thus, whatever uncertainty previously existed as to the scope of the **Colgate** doctrine, **Bausch & Lomb** and **Beech-Nut** plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. 362 U. S. 29, 43.

The gasoline and TBA cases clearly show the wisdom of adopting an antagonistic-coercive rationale of "combination" in resale price maintenance cases. In **Simpson v. Union Oil Company of California**, 377 U. S. 13, resale price maintenance was accomplished by the supplier. In form, the retailer was obligated by a consignment contract. In actuality his signature on the contract and any

adherence he gave to suggested resale prices were both obtained by the overwhelming economic coercion of the large oil company. Union Oil did not agree or conspire with other oil companies, or with other retailers, or with any other persons, but acted wholly by itself in coercing the retailer. But the resale prices, when the coercion was effective, were the result of the combined actions of the supplier in coercing and the retailer in knuckling under and complying. The relationship is antagonistic and coercive, not consensual or conspiratorial. There is no common purpose, no voluntary concert of action. If the coercion is lifted the retailer ceases to adhere and exercises his own independent pricing judgment. The formality of a contract, also induced by the coercion, is meaningless. The result should be no different if the contract did not exist. The Ninth Circuit and the Fourth Circuit were right in holding that unlawful combinations can exist between gasoline suppliers and their retailer customers when no contracts, express or implied, have been entered into. **Lessig v. Tidewater Oil Co.**, 327 F. 2d 459 (C. A. 9), cert. den. 377 U. S. 993; **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566 (C. A. 4).

The antagonistic-coercive view of "combination" in Section 1 of the Sherman Act is absolutely essential to carrying out the purpose of the Act in resale price maintenance cases. The flow of competitive decisions must be preserved. The important competitive decisions in these cases are the pricing decisions of the buyers—as is clearly indicated by the ingenuity and vigor of sellers' efforts to shut them off. The flow of buyers independent pricing decisions can not be preserved if "combination" requires agreement, express or implied, or voluntary concert of action for a common purpose. If this view prevailed it is all too clear what would happen. Every seller could whip his customers into line on resale prices by the most vicious economic coercion so long as he did not act in concert

with a third person and did not force the customer to sign a resale price contract. The actions of the Globe-Democrat herein must be held to have created, as a matter of law, an unlawful "combination" in violation of Section 1 of the Sherman Act regardless of whether the persons it entwined in those actions shared a "common purpose" with the Globe-Democrat.

V.

The Newspaper Industry Shows the Evil That Would Result From Requiring "Common Purpose" as an Element of "Combination".

A specific example of the destruction of the competitive system that would result if "combination" were held to require an element of "common purpose" can be seen in the facts of this case and of the newspaper industry. Newspapers have a more compelling reason than humanitarian concern for the consumer to want to hold down resale prices. Newspapers sell readers to advertisers. **Times-Picayune Pub. Co. v. United States**, 345 U. S. 594, 613. The more readers, the higher the lineage rate for advertising. This is the reason why newspapers want to control the retail price. Before 1961, the St. Louis newspapers had every right to control retail price because the newspaper made the sale and delivered its papers through its own employees who were members of St. Louis Newspaper Carriers' Union No. 450. In 1961, the defendant herein, the Globe-Democrat, and the other St. Louis newspaper, ended all employer obligations to the home delivery carriers, such as unemployment insurance, workmen's compensation, paid vacations and other benefits by refusing to renew the collective bargaining contract and taking the view that the carriers were independent merchants (R. 53-58). Every newspaper in the country has sole control over whether carriers are employees or independent mer-

chants, by virtue of the National Labor Relations Board rule. If the publisher reserves control over manner and means, carriers are employees; but if he reserves control only as to result sought, they are independent merchants. **Lindsay Newspapers, Inc.**, 130 N. L. R. B. 680, aff'd. 315 F. 2d 709.

If a newspaper can induce a carrier's customers to call him a cheat and thief, to curse him out over the 'phone and move away from him in church (R. 41-42); to arrange with a third party, Milne Circulation Sales Corporation, to solicit his customers because he is "overcharging" and thus take away one-fourth of his customers, and withhold them by turning them over to another carrier; terminate him when he sues for relief and refuses to comply with the suggested resale price; and all the time use the hardship it has caused as a lever to get adherence to its resale price; and still not be in violation of Section 1 of the Sherman Act so long as it does not act in common purpose with any third persons, every newspaper in the country could use this means to avoid paying carriers decent wages as employees and, at the same time, prevent them from making the profit necessary to enable them to stay in business and provide good service to the subscribers. Such a situation could only lead to pressures destructive to the economic system.

CONCLUSION.

In the case at bar an unlawful combination in violation of Section 1 of the Sherman Act came into existence as a matter of law the instant defendant went beyond prior announcement of its suggested resale price and mere declination to sell to Albrecht for non-compliance, and began to bring pressure upon Albrecht to overcome his independent business judgment. As a matter of admitted fact, defendant engaged in many acts that went beyond the

permissible limits which did cause the adherence of Albrecht to the Globe-Democrat's suggested resale price. Termination was for refusal to comply with the unlawful resale price maintenance arrangement. The facts were not controverted by the Globe-Democrat. Albrecht was entitled to prevail on his motion for summary judgment on the matter of liability, or later on his motion for judgment n. o. v.

Petitioner respectfully prays the Court to reverse the decision below and direct that judgment be entered for Petitioner Albrecht on the matter of liability and a trial be had on the amount of damages resulting from the unlawful solicitations and the unlawful termination.

Respectfully submitted,

By

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I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 24 day of August, 1967, I served 2 copies of the foregoing Brief for Petitioner on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By
Donald S. Siegel,
Member of the Bar of the United
States Supreme Court.

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THE
SOUTHERN CASES OF THE UNITED STATES
COURTS, 1897

No. 43

LESTER J. ALLEN, Plaintiff

v.

THE HERALD COMPANY, & COMPANY,
Cross-Defendant Publishing Company

As Held at Conference of the United States Circuit Court
for the Fifth Circuit

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 43

LESTER J. ALBRECHT, *Petitioner*

v.

THE HERALD COMPANY, a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**BRIEF OF AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION, AS AMICUS CURIAE**

By consent of the Petitioner and Respondent herein, the American Newspaper Publishers Association files this brief as Amicus Curiae, in support of the decision of the United States Court of Appeals for the Eighth Circuit affirming the judgment for the

Respondent, The Herald Company, entered without opinion by the United States District Court for the Eastern District of Missouri, on a jury verdict. The opinion of the Court of Appeals is reported at 367 F.2d 517.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership consists of 1,002 daily newspapers, whose publications represent more than 90% of the total daily and Sunday circulation of newspapers published in this country.

The Association's members are vitally interested in the basic issue herein, namely, whether a publisher may, pursuant to its interest in maximum circulation, sell its newspaper directly or to more than one distributor in areas where circulation is threatened by overpricing.

A substantial number of the Association's members utilize independent adult carriers for distribution to home subscribers. Home subscriptions, moreover, are estimated to account for over 80% of newspapers' total circulation. In submitting this brief, the Association wishes to assure its members that they may continue to publish suggested prices and subscription rates conducive to orderly and economic circulation.

BACKGROUND

Newspapers generally utilize four basic means of accomplishing distribution to their readers. One is by newspaper boy; another is second class mail; a third is by newsstands sales, and a fourth is by adult carriers

or distributors, who purchase their newspapers and then bill the subscribers on their route for their own account. Considerations of distribution efficiency have usually led to the creation of exclusive areas of delivery, or routes. In these areas, there is ordinarily no competition among the adult carriers, although copies are also sold by stores, racks and street corner salesmen in these areas.

A large percentage of newspapers' circulation, however, is made up of home deliveries. These subscribers constitute the most stable element in a newspaper's circulation, and for this reason, newspapers expend considerable time and effort to increase these subscriptions. Many new subscriptions are phoned into newspapers' offices directly, as a result of the image and good will the newspaper has been able to establish in its community over the years. But most newspapers also conduct active publicity campaigns of varying sorts to acquire new subscriptions. These include premiums, trips, introductory offers, visual advertising, and telephone solicitation supported directly by the newspaper. Frequently, deliverers, whether adult or newspaperboys, are given premiums or bonuses for each new subscription brought in. Ultimately, subscribers lists are the result of long years of careful attention and large financial outlay by newspapers. Where the business in a given area is not large enough to pay a carrier for delivery, newspapers have protected their investment by paying the carrier until the difference between the established buying and selling prices of the papers would afford satisfactory pay. See *Journal of Commerce Publishing Co. v. Tribune Co.*, 286 Fed. 111 (7th Cir. 1922).

Unlike the usual industry for which revenue, with given production costs, is determined by market demand for the product balanced against the market price for the product, newspapers are a service whose net revenue is dominated by a wholly different factor: advertising. The market demand for newspapers, at least in today's market, will not sustain a circulation sales price even approximating the cost of publication.

In 1966, the newspaper market supported 1,848 newspapers at 10¢ per daily copy or under, and only seven newspapers at more than 10¢ per daily copy (not to mention "shoppers" distributed free).¹ At 10¢ per copy, even disregarding soaring costs of labor and machinery, many newspapers did not even pay the cost of their newsprint and ink from circulation revenues. A typical daily newspaper in the 240,000 circulation range spent in 1966 \$4,411,283.05 on newsprint and ink, while it received only \$2,948,318.24 in total circulation income.² This has frequently been the situation since the advent of daily newspapers in this country.³

Statistics accumulated by the Amicus Curiae indicate that approximately 25% of the gross revenues of member newspapers were derived from circulation, while almost 75% were derived from advertising.⁴ In these circumstances, it must be concluded that the

¹ American Newspaper Publishers Association, Gen. Bulletin, Feb. 8, 1967, at 54 (includes Canada, U.S. Virgin Islands, Bermuda, Puerto Rico and West Indies).

² EDITOR & PUBLISHER, April 1, 1967, at 14.

³ LEE, *THE DAILY NEWSPAPER IN AMERICA* 273 (1937).

⁴ See also EDITOR & PUBLISHER, April 1, 1967, at 14; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 604 (1953).

primary "product", in any meaningful business sense, is advertising, not the paper distributed by the carrier.

Thus, revenues in the newspaper business are not directly determined by the market demand for the newspaper, but rather are principally determined by the market demand for advertising space. The price of daily newspapers has never been, and cannot be, determined by the market for circulation of the newspaper. On the contrary, pricing policies must be determined by the relevant market considerations for advertising.

Circulation (as opposed to circulation income) is such a consideration and is therefore of controlling importance to newspapers, for the reason that advertising rates are governed by circulation. Advertisers view newspaper rates from a "per inch per thousand circulation" basis, and all newspapers reflect circulation in their rate structures. Thus the average line rate for a newspaper of 50,000 is 22.1¢; for a newspaper of 100,000, 34.8¢; for one of 200,000, 56.1¢, and for 500,000 \$1.169.⁵

For this reason, every newspaper has a vital concern for circulation which goes far beyond its income producing capacity, as a result of sales. This capacity, as has been pointed out, is relatively insignificant compared with the circulation which can be certified by the Audit Bureau of Circulation. The pricing of the paper is, therefore, and must be, carefully balanced against the effects on advertising circulation.

Statistics accumulated by the Association from its members indicate that any upward change in price

⁵ *The Richmond (Va.) Times-Dispatch*, Milline Rates and What They Mean, 1956 (unpublished pamphlet).

normally results in a substantial drop in circulation. The Association's survey of 1966 increases in circulation prices, based on replies from 1,322 daily newspapers in the United States, Puerto Rico, Canada, West Indies and Bermuda showed that of 335 newspapers who reported price increases and their effects during the year, 42% (141) lost circulation. These losses were typically around 10%, and 36% of those who reported circulation decreases were unable to recover any of their loss during the year. Seventy percent failed to recoup more than half of their circulation loss.⁶

These statistics indicate that accompanying any price increase is an approximately 50% risk of a cir-

⁶ American Newspaper Publishers Association, Gen. Bulletin, Feb. 8, 1967, at 56. Individual instances may be helpful:

In 1957, the *Toronto* (Ont.) *Star* abruptly raised its price from 5¢ to 10¢. The *Star* suffered 97,000 cancellations the first eleven days after the price increase. A year later, the *Star's* circulation had still failed to recover. EDITOR & PUBLISHER, May 16, 1964, at 82.

On February 3, 1958, the Jeannette (Pa.) *News-Dispatch* increased its price from 5¢ to 7¢. Weekly home delivery became 35¢ instead of 25¢. At the end of six months, circulation had dropped from 10,374 to 9,450 (approximately 9%). At the end of a year, less than half this loss had been regained. International Circulation Managers Ass'n, Bulletin, Sept., 1959, at 11.

On April 4, 1960, the *Atlantic City* (N.J.) *Press* raised the price of its daily paper from 5¢ to 7¢ home delivery, and 10¢ on newsstands. At the end of a year, circulation was still off 2.6%. EDITOR & PUBLISHER, Oct. 29, 1960, at 30.

By the same token, price decreases had equally powerful effects, when production cost factors permitted them:

On October 10, 1898, the *New York Times* reduced its price from 3¢ to 1¢, and is reported to have tripled its circulation. LEE, THE DAILY NEWSPAPER IN AMERICA 272 (1937).

ulation loss substantial enough to affect advertising rates. At the average rate of \$.348 per line for a newspaper of 100,000 circulation, a loss of 10,000 in circulation would place the newspaper in competition with the newspapers averaging \$.322 per line.⁷

The considerations underlying newspaper pricing policy are clearly more complex than balancing increased sales revenue against decreased market demand. There is a third factor present which must be carefully considered before any increase in price is envisioned because of its drastic effect on total revenue. Frequently, newspapers undertake carefully planned promotion campaigns to prepare readers for a circulation price increase. Such promotion is started well in advance of the scheduled increase, and continues after the increase becomes effective.⁸

This advertising factor which constitutes such an important desideratum for newspapers, is outside the interest or consideration of distributors. Almost wholly lacking, therefore, is that basic identity of interest between manufacturer and dealer which is usually found in the common goal of maximum sales revenue. In this essential feature, the case now before the Court differs from all those cited by the Petitioner herein.

⁷ *The Richmond (Va.) Times-Dispatch*, Milline Rates and What They Mean, *supra*. At this rate, moreover, the Advertiser is also paying a higher rate "per line per thousand circulation." At 100,000 circulation, the "milline" rate is \$3.48; at 90,000, even with the reduced charge, the cost to the advertiser becomes \$3.58 per line per thousand circulation. *Ibid*.

⁸ See American Newspaper Publishers Association Circulation Bulletin, Feb. 13, 1963, at 23 (relating to *Roanoke (Va.) Times* and *World News* and *id.*, Aug. 22, 1962, at 37 (relating to *Portland (Me.) Press Herald and Express*).

ARGUMENT**L****THE HERALD COMPANY'S CONDUCT DID NOT COERCE THE PETITIONER OR OTHERWISE OPERATE IN RESTRAINT OF TRADE.****1. A Supplier's Cessation of Business With a Dealer Who Has Instituted Suit Against It Does Not Violate Section 1 of the Sherman Act**

It must be pointed out at the outset that the Respondent, The Herald Company, did not terminate dealing with the Petitioner Albrecht for his insistence on charging subscribers more than the published subscription rates. To the contrary, the Respondent continued to supply Petitioner with newspapers despite his pricing policies, and Petitioner does not allege that Respondent either threatened or intended to terminate dealings with him until the Petitioner filed suit in the District Court for the Eastern District of Missouri. This occurred on August 12, 1964, nearly three years after Respondent had become aware of, and objected to, Albrecht's undesirable delivery charges. And it was not until more than a week after, or August 21, 1964, that the Herald gave Albrecht sixty days notice of termination.

It is firmly established that a person may discontinue business relations with one who has brought suit against him. Certainly the good faith and understanding necessary to mutually beneficial business relations cannot be sustained where differences have come to the point of litigation. And so the courts have repeatedly held that to terminate dealing because of a suit does not constitute a violation of the anti-trust laws of the United States. See *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173 (D.C. Cir. 1965);

House of Materials, Inc. v. Simplicity Pattern Co.,
298 F.2d 867 (2d Cir. 1962).

In fact, the *unilateral* cessation of business with a dealer is not illegal under section 1 of the Sherman Act, even if motivated by a desire to punish for price cutting "or anything else, however reprehensible." See *Dart Drug Corp. v. Parke, Davis & Co.*, *supra*, at 186. But it must be emphasized that that is not the case before this Court.

**2. The Publication of Carrier Delivery Rates Does Not
Constitute a Violation of Section 1 of the Sherman Act**

Pursuant to the economic importance of circulation, as opposed to circulation revenue, newspapers retain an exceptional interest in the ultimate price of its service to the consumer, which interest is different in kind from that of any other business. The publishing of subscription and carrier delivery rates has been a part of the newspaper business since its inception. In conformance with this practice, The Herald Company published rates, and upon receiving complaints from subscribers on Petitioner's route, urged the Petitioner not to charge more than such rates.

The holding of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), at 307, clearly encompasses such conduct:

In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

While circumscribed by various subsequent decisions, the essence of the holding, that an individual entity may "announce in advance" the bases upon which it will enter business relations with dealers or anyone else, remains the law, as well as a fundamental precept of our "free enterprise" system.

It is firmly established that the simple announcement of suggested resale prices, even when combined with requests for compliance, is not a violation of the Sherman Act. See *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3rd Cir. 1963); *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 82 (S.D. Cal. 1961). In *Klein*, it was found that "prospective retailers were 'advised' of American's price maintenance policy, and its expectation that those to whom it sold its lines would not sell below pre-ticketed prices." *Klein v. American Luggage Works, Inc.*, *supra*, at 790-91.

3. The Utilization of Additional Means of Distribution Does Not Constitute Restraint of Trade

The Petitioner had no franchise or other exclusive dealership contract. Within the area served by Albrecht, The Herald Company had customarily sold papers directly to stores and through street racks and street corner salesmen who also made some home deliveries.

As a matter of operating efficiency, newspapers generally sell to only one carrier for a given area. This custom has sometimes led to the attribution of a "value" to routes in the sale of a "going business" by one dealer to another. But this does not create a legal right to continued dealing where there is no contract. See, e.g., *Fisher v. News-Journal Co.*, 26 Del. Ch. 47,

21 A.2d 685 (1941). As pointed out above, newspapers devote great attention and spend large sums of money in building up their subscription lists, usually receiving orders from subscribers, whose names and addresses they turn over to the nearest carrier and spend large sums on promotions and securing new subscribers by other means. Cf. *Journal of Commerce Publishing Co. v. Tribune Co.*, 286 Fed. 111 (7th Cir. 1922).

In the instant case there was no contractual obligation on the part of the newspaper to continue to deal with Albrecht, nor for Albrecht to continue to deliver, or to find a substitute upon cessation. There was no agreement or obligation on the part of the Herald to refrain from selling to others in Albrecht's or any other area, whether dealers or individuals. There is no reason, contractual or otherwise, why the route in which Albrecht delivered belonged to Albrecht, or constituted a franchise or exclusive territory. In fact, it has been held that it is unlawful for dealers to conspire to prevent a newspaper from selling to competing newspaperboys within the dealer's areas. See *Evening News Publishing Co. v. Allied Newspaper Carriers*, 263 F.2d 715 (3rd Cir. 1959). As pointed out above, The Herald Company had in fact been dealing with others in the area in which Albrecht delivered, since the beginning.

Under these circumstances, The Herald Company was under no obligation to refrain from selling to persons on Route 99, either directly or through other dealers. At any time, moreover, the Herald could have ceased distribution through dealers altogether, and undertaken to accomplish circulation through its own employees. See *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per*

curiam, 344 F.2d 775 (3rd Cir. 1965). If a business' substitution of an exclusive dealership for multiple dealerships is not a contract in restraint of trade, how much less so when multiple dealerships are substituted for an exclusive. Cf. Fulda, *Individual Refusals to Deal*, 30 LAW & CONTEMP. PROB. 590, 598 (1965).

Manufacturers must be free to discontinue dealing, even to refuse renewal of franchises, when they cannot count on identity of interest with their dealers. Fulda, *supra*, at 606. It is thus settled that manufacturers may dismiss dealers who sell competing products and otherwise dissipate their selling efforts. See e.g., *Journal of Commerce Publishing Co. v. Tribune Co.*, 286 Fed. 111 (7th Cir. 1922); *Deltown Foods, Inc. v. Tropicana Prods., Inc.*, 219 F. Supp. 887 (S.D.N.Y. 1963). Where a dealer pushes a competing brand, or fails to maintain minimum sanitary or display standards, the competitive order is not endangered but likely to be enhanced by permitting the manufacturer to insist that his dealers consider his products as their primary responsibility, or otherwise meet his standards. A manufacturer is not required to retain dealers "with divided loyalties adverse to his interests."

There is a comparable opposition of loyalties and adversity of interest where a carrier insists upon charging subscribers more than the amount considered optimal for maximum circulation by the newspaper. Unless offset by alternative outlets, such overcharging creates chaos in the circulation system. Where the practice of route/zones exists, one subscriber on one side of a street may be required to pay one price, while across the street his neighbor may pay much

less. Newspapers must be permitted to determine whether a carrier's price increase is for the carrier's benefit at the newspaper's expense, or whether such increase is justified by economic conditions in the area which would confront any carrier.

Thus, the Company could have ceased dealing with Albrecht for his refusal to adhere to the pricing policies which had effectively developed the *Globe-Democrat's* subscription lists. See *Quinn v. Mobil Oil Co.*, *supra*; *Klein v. American Luggage Works, Inc.*, *supra*; *Journal of Commerce of Publishing Co. v. Tribune Co.*, *supra*; *Tobman v. Cottage Woodcraft Shop*, *supra*.

As pointed out in *Collins v. American News Co.*, 34 Misc. 260, 263, 69 N.Y. Supp. 638, 641, *aff'd mem. dec.* 68 App. Div. 639, 74 N.Y. Supp. 1123 (1901):

The plaintiff virtually takes the selfish one-sided view that, since his business is lawful, the defendants must aid him in it, so far, at least, as to sell him their papers, even if it be to their own hurt, so long as it is to his profit. There is no view of the case in which it can be said that the defendants have been guilty of a conspiracy in restraint of trade; nor is there anything like dictation on the part of the publishers as to the manner in which the plaintiff shall conduct his business. They simply say, as they have a right to say, arbitrarily if they choose, that they will not sell their papers to the plaintiff. Doubtless the discontinuance of a supply of papers to the plaintiff will seriously injure him in his business; and, on the other hand, to continue that supply will, to some extent at least, be an injury to the publishers.

But despite Albrecht's insistence upon charging The Herald Company's subscribers more than that considered desirable by the Herald, the Herald continued

to deliver papers to Albrecht, until after Albrecht filed suit, and in no way interfered with Albrecht's business. Cf. *A-1 Business Machine Co. v. Underwood Corp.*, 216 F. Supp. 36 (E.D. Pa. 1963). Petitioner's claims of interference are belied by his admission that he ultimately sold his business for one thousand dollars more than he had paid for it, despite his loss of some 300 subscribers.

The conduct attributed to The Herald Company constitutes nothing more than that competition which the Sherman Act was designed to protect. The Herald did nothing more than any other businessman offering a service offered by others as well. It advertised its lower price. In seeking to protect its circulation, which Petitioner not only failed to increase, but to which Petitioner admits a loss of six during his dealership (Brief of Petitioner, at 7); the Herald secured the service of its public relations agent, the Milne Circulation Sales Corporation, who conducted telephone and door-to-door solicitation. The Herald also mailed letters to the residents on Petitioner's route informing them that the *Globe-Democrat* could in fact be acquired at the rates published by the newspaper.

Nothing herein constitutes coercion or "restraint of trade" as required by section 1 of the Sherman Act. The sole "restraint" of which Petitioner can complain is the Herald's establishment of alternative means by which subscribers could obtain such deliveries, and the advertising of a price lower than that charged by Albrecht. Albrecht retained his supply of papers, and remained free to meet the Herald's lower price, or rely on good will and service to justify his higher price.

Petitioner suggests no reason why he should be protected against the operation of another carrier in his territory with whom the publisher would rather deal, nor why the publisher should be forbidden from dealing directly with subscribers who do not wish to purchase from the carrier.

Whatever pressure Albrecht felt to reduce his prices was simply the pressure created by an ordinary advertising campaign on behalf of a competitive outlet. In this basic way, the instant case differs from all those cases cited by the Petitioner, and the Court of Appeals was correct in concluding that far from restraining trade, the Herald's conduct protected the public interest from the effect of monopoly. 367 F.2d at 522; see also *Lepler v. Palmer*, 150 Misc. 546, 270 N.Y. Supp. 440 (1934).

II.

SECTION 1 OF THE SHERMAN ACT PROHIBITS "CONTRACTS," "COMBINATIONS," AND "CONSPIRACIES" IN RESTRAINT OF TRADE, BUT DOES NOT PROHIBIT UNILATERAL ACTION.

Section 1 of the Sherman Act provides that

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

The following quotation gives proper emphasis to the provisions here relevant.

As already indicated, the distinction between unilateral and collaborative or conspiratorial action is fundamental in the American antitrust system and could not be done away with without altering the Sherman Act. Indeed, it is hardly necessary to call attention to the fact that at least two independent business entities are required for

violation of section 1, while one alone may be liable under section 2. This statutory scheme reflects a philosophy that exalts the liberty and initiative of the individual enterprise, and looks with suspicion on collective action. The latter is inherently dangerous because it represents aggregations of power that are likely to be used in a manner detrimental to the public interest. This is the ultimate reason for the necessity of drawing 'demonstrable demarcations' between individual and group conduct. Fulda, *Individual Refusals to Deal*, 30 LAW & CONTEMP. PROB. 590, 603 (1965).

The cases relied on by the Petitioner are not in point because they involved facts of conspiracy, combination, boycott, or active policing which are absent here. "Contract" may include that between manufacturer and dealer (*Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)), but in the instant case there was no contract binding Albrecht as to pricing, nor even a refusal to deal without such a contract. Nor was there any "unlawful arrangement" between The Herald Company and competitors or other dealers, as existed in *Osbourn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963). Milne Circulation Sales Company was but an agent of the Herald. And the Herald's only relationship with Kroner was the turning over of subscription lists of routes already established by the Herald, for service by Kroner.

Petitioner cites *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), as governing. (Brief of Petitioner, p. 18.) In *Parke, Davis*, however, the manufacturer had refused to deal with Dart Drug and had previously sent agents to secure agreements from all Dart's competitors, which were shown to Dart in order to obtain its adherence. Subsequently it had

obtained agreements from its wholesalers not to supply Dart Drug. This Court then said, at 45-46:

Although Parke Davis, announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice of . . . illegality," . . . when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

In relying on this Court's phraseology "without more" to support his proffered instructions, Petitioner overlooks the specification of the illegal combination which constituted the "more" in that case. For this reason, Petitioners' instructions were properly refused by the District Court. *Cf. Quinn v. Mobil Oil Co.*, 375 F.2d 273, 275 (1st Cir. 1967).

In *Simpson v. Union Oil Co.*, *supra*, this Court distinguished *Colgate* by its lack of an agreement holding "only that resale price maintenance through the present, coercive type of 'consignment agreement' is illegal under the antitrust laws . . ." 377 U.S. at 24.

It has been repeatedly held that a refusal to supply is not actionable unless connected with a combination or conspiracy in restraint of trade. See, *e.g.*, *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, (1967 Trade Cases) TRADE REG. REP. ¶72,135 (4th Cir. 1967); *Quinn v. Mobil Oil Co.*, *supra*; *Deltown Foods, Inc. v. Tropicana Prod., Inc.*, 219 F. Supp. 887 (S.D.-N.Y. 1963)

In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), this Court held that where there was no con-

tract, combination or conspiracy, a manufacturer could refuse to supply a dealer who refused to abide by the manufacturer's resale prices. That decision has never been overruled, nor should it be as section 1 of the Sherman Act is now written.

In *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173 (D.C. Cir. 1965), the right of the manufacturer to unilaterally terminate supplies was upheld, even if such termination had been to punish Dart for its President's testimony in the Government's proceedings against Parke, Davis. See also *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2nd Cir. 1962).

In *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3rd Cir. 1963), it was likewise held that a manufacturer could unilaterally terminate dealing with a retailer who charged more than the price tags fixed to the merchandise by the manufacturer.

In *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam* 344 F.2d 775 (3rd Cir. 1965), a preliminary injunction against the termination of supplies to newspaper dealers who charged subscribers a service charge for home delivery was denied.

And in *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 82 (S.D. Cal. 1961), it was held not illegal for a manufacturer of patio furniture to investigate violations of its suggested retail prices, and to terminate supply to the violating retailer. See also *Quinn v. Mobil Oil Co.*, *supra*.

It has been remarked that

The *Klein* opinion shows that facts like those involved in *Colgate* still happen and that the result of *Colgate* seems reasonable when applied to such

facts unless the *Colgate* rule were to be replaced by the novel proposition that unilateral action in aid of maintaining resale prices violates section 1 of the Sherman Act. Fulda, *supra*, at 595.

Certainly where the detection of price cutting is accidental or unsolicited and solely the result of the manufacturer's own effort (Cf. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 772 (1944)), unilateral refusals to deal in furtherance of resale price maintenance are still permissible. See Fulda, *supra*, at 604-05.

III.

FREEDOM OF THE PRESS INCLUDES THE RIGHT TO INSURE ECONOMIC CIRCULATION BY LEGITIMATE MEANS, AND ANY ABRIDGMENT OF THIS RIGHT IS IN VIOLATION OF THE FIRST AMENDMENT.

The first amendment of our Constitution provides that

Congress shall make no law . . . abridging the freedom of speech, or of the press

This right to produce written knowledge which is thus protected from government infringement includes the right of dissemination. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). In fact, the history of the first amendment as outlined in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), indicates that it was the elimination of the threats to circulation presented by the stamp acts which was one of the principal objectives of the amendment.

In *Grosjean*, this Court struck down a license tax on the business of publishing advertising, stating

"it might well result in destroying both advertising and circulation." *Id.*, at 245. It pointed out that the underlying issue, the "taxes on knowledge" embodied in the stamp taxes on newspapers, constituted one of the principal grievances of the rebellious colonies. At 246, it stated "that the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people"

Obviously, pricing is of extraordinary importance to the publication of news and opinion which, unlike books, is of only fleeting value and cannot be viewed as a durable investment. As noted above, small increases may have disastrous effects on circulation, and this is true whether the increase is caused by the overcharge of a distributor, taxation, or the voluntary policy of the newspaper itself.

Thus, the right to present one's views to the public must include the right to establish the price range at which such views will be available, and the freedom to deal with those who will make such views available at that price. A dealer's practice of charging excessive rates is no less detrimental to circulation than an outright tax. In effect, it is a "tax on knowledge," and is no less injurious because privately imposed.

Certainly, if a publisher is to be prohibited from controlling the prices at which dealers will circulate his work, he *must* be free to seek alternative, cheaper means of distribution. In view of the economic dependence of newspapers on adequate circulation, it would be an abridgment of the freedom of the press to prohibit the use of published "Subscription Rates," and to prohibit Respondent from seeking alternative

outlets when circulation is threatened by dealer profit-taking.

Of course, no claim is made that newspapers are exempt from the Sherman Act. This issue is too well settled to resurrect. But this Amicus respectfully submits that any construction of section 1 of the Sherman Act to prohibit the conduct in this case would constitute an abridgment of those freedoms specifically protected by the first amendment.

IV.

THE HERALD COMPANY'S CONDUCT DID NOT CONSTITUTE A "PER SE" VIOLATION; HENCE THE JURY VERDICT MUST STAND.

Petitioner asserts that the Court of Appeals was in error in holding that Respondent's conduct was not illegal "per se". The rule that price fixing constitutes a "per se" violation is not apposite to the facts in this case.

First of all, there can be no application of the rule unless the record clearly shows that there has in fact been price fixing. This requires an element of coercion or compulsion which is simply not present in the instant case. See Argument I, *supra*. As pointed out by the Court of Appeals, 367 F.2d at 525,

A common sense consideration of the record evidence compels the conclusion that Globe-Democrat's action in providing competition did not remotely restrain trade, but, contrarily, fostered competition

The Petitioner at all times remained free to charge what he wished. Completely absent is that bludgeon of discontinuance which underlies the "per se" cases in this field.

Secondly, there must have been a finding of combination or conspiracy before there can be any "per se" violation of a statute which prohibits only concerted, as opposed to unilateral action. The "per se" illegality of price fixing depends upon a finding of combination or conspiracy. The existence of such a combination or conspiracy is a question of fact for the jury. *Cf. Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 528 (S.D.N.Y. 1965). In the instant case, this issue has been decided against the Petitioner, and that decision is final. Where there is an evidentiary basis for the jury's verdict, the jury is free to disregard or disbelieve whatever facts are inconsistent with its conclusion, and only where there is a complete absence of probative facts to support the conclusion drawn by the jury is it reversible error to overrule a motion for judgment notwithstanding the verdict. 5 AM. JUR. 2D., *Appeal & Error* § 819 (1962); see FED. R. CIV. P. 52(a).

Petitioner objects to the District Court's instruction attempting to make the word "combination" meaningful to the jury. Certainly the court's reference to "common purpose" is fully warranted by the accepted meaning of the word which must be taken to have been the meaning intended by Congress. See MERIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 533 (2d ed. 1951) ("combine . . . 2. Specif., to form a union for a common end or purpose; to confederate"). And certainly the Petitioner cannot complain that the valid substance of his proffered instructions was not adequately covered by that court's ample instructions. See 367 F.2d at 520.

Finally, the rule that price fixing is a "per se" violation is not of universal applicability. Under unusual circumstances, whether relating to the character

or to the effect of the arrangement, it is held that an agreement affecting prices is not an undue restraint of trade. *Cf. Board of Trade v. United States*, 246 U.S. 231 (1918); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 720-23 (D. Hawaii 1964). It is submitted that the peculiar circumstances of this case present such a situation. These circumstances include the history of newspaper and periodical pricing, the newspaper's effort and investment in the development of subscription lists, the economic importance of pricing policy to newspapers resulting from low circulation revenue and the relation of circulation volume to advertising revenue, the ambiguous nature of the conspiracy and restraint charged, and the considerations raised by the first amendment's guarantee of unfettered circulation.

CONCLUSION

Unlike any of the businesses involved in cases cited by the Petitioner, newspapers are economically dependent upon a factor in which dealers are in no way interested—advertising. Because advertising rates depend on circulation, newspapers' interest in quantity of circulation is an interest different in kind from that of the dealer.

Despite this importance of pricing, The Herald Company did not refuse to deal with Petitioner for his insistence upon charging rates in excess of those considered optimal by the newspaper. There was no refusal to deal until after Petitioner filed suit. Prior to this the Herald merely attempted to establish alternate means to make the *Globe-Democrat* available to its subscribers at the suggested rate.

While a refusal to deal unless the buyer join the seller in a contract violative of the Sherman Act may

be illegal, we have here only a threat to establish an additional outlet, that is, to compete, should the dealer refuse. The dealer was no more coerced in his pricing policy than any dealer threatened by competition. All competition creates a pressure to conform to the lower price; the question is whether an unlawful *pressure* has been created.

Agreeing to sell at the suggested price was not a condition to dealing, as shown by Petitioner's three year record of overcharging without interruption of supply. Those who indicated they would comply were not bound to do so, but could change their prices at will, although it is established that the newspaper might then deal or not deal with them as its policy then dictated. Petitioner has proven neither "contract," "conspiracy" or "combination," nor "restraint of trade," as required by section 1 of the Sherman Act.

In fact, the gravamen of Petitioner's complaint is simply that The Herald Company refused to act in concert with him in his desire to create a monopoly. It is respectfully submitted that the opinion of the Court of Appeals for the Eighth Circuit should be affirmed.

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1967.

No. 43.

**LESTER J. ALBRECHT.
Petitioner,**

v.

**THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.**

BRIEF FOR RESPONDENT.

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IN THE
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LESTER J. ALBRECHT.
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v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

A. The Facts.

This is a treble damage action for alleged violation of § 1 of the Sherman Act, brought by the petitioner, Albrecht, a retail newspaper dealer, against the respondent, the publisher of the St. Louis Globe-Democrat, a daily and week-end newspaper (R. 1).

Under the statement of policy unilaterally announced by the publisher, a dealer like Albrecht was given a terri-

tory within which to make home-delivery sales, which was to be

“maintained exclusively to him . . . so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher” (R. 60).

Albrecht testified: “Never had I agreed to that statement of policy” (R. 61).

Albrecht insisted on overcharging and respondent commenced competing with him in his territory by soliciting sales and selling at the suggested price (R. 8, 9), all the while selling such newspapers to Albrecht as he requested at the previous wholesale rate. Respondent employed Milne Circulation Sales, Inc., its normal circulation sales agent, to solicit subscribers in the Albrecht territory at the suggested price (R. 61, et seq.). By early July, 1964, respondent had acquired a customer list in the same territory of three hundred-some customers (R. 75). These were turned over for servicing to another carrier, George Kroner, during the latter part of July (R. 78). Kroner never did solicit anybody for sales in this territory (R. 79).

On August 12th Albrecht filed this suit (R. 139). Respondent then notified him that it would cease selling him wholesale newspapers after sixty days (R. 48), but would permit him to sell his route during that period (R. 48). At his request it extended the sixty-day limit an additional ten days (R. 49). Albrecht sold the route at a profit of \$1,000 (R. 22, Br. 11).

All of the testimony was put on by petitioner. After the evidence was all in, petitioner amended his complaint in the particulars set out in part B of this statement. The cause was submitted to a jury, which found for the respondent (R. 142). The Court of Appeals affirmed—367 F. 2d 517, R. 145, et seq.

B. The Complaint.

Petitioner's original complaint was in two counts, Count I for a common law tort of malicious business interference based upon diversity of citizenship and Count II for conspiracies and combinations, "accomplished and brought about by contracts, agreements and understandings" in violation of the Sherman Act (R. 7, et seq.).

Count I was dismissed just prior to trial (R. 141).*

Apart from the reincorporation of Count I by Paragraph 17, the Sherman Act, Count originally read as follows:

"18. During all of said times the Publisher has entered into contracts, agreements or understandings and has unlawfully conspired and combined with a person or persons engaged in the newspaper business pursuant to which the Publisher has fixed . . . prices . . .

"19. Each and all of the aforesaid unlawful conspiracies and combinations entered into by and between the Publisher and a person or persons unknown to plaintiff were in restraint of the trade . . . and were accomplished and brought about by contracts, agreements and understandings between the Publisher and a person or persons unknown to plaintiff, and the acts done pursuant thereto were in violation of and contrary to Sections 1 and 2 of Title 15, U. S. C. A. . . ."

"At the close of all the evidence in the case and after a Motion for a Directed Verdict was filed by plaintiff, and during the time that the charge of the Court was being considered . . . the plaintiff filed a Motion to Amend his Complaint" (R. 109).

* Nevertheless, echoes of the dismissed count still appear in petitioner's brief (Br. 15, top).

The amendment recites that it was made (R. 111), "In order to conform to the evidence." The amendment, which was permitted (R. 109), (a) substituted for the words "a person or persons unknown to plaintiff" and "third person or persons" wherever they appeared, the words "plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner," and (b) deleted the words "conspired", "colluded", "conspire", "conspiracies", "collusion" wherever they appeared (R. 110, 111).

Applying the amendment to the pleading gives the following present record complaint:

"18. During all of said times the Publisher has entered into contracts, agreements or understandings and has unlawfully and [*sic*] combined with a person or persons engaged in the newspaper business pursuant to which the Publisher has fixed . . . prices . . .

"19. Each and all of the aforesaid unlawful and [*sic*] combinations entered into by and between the Publisher and plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner were in restraint of the trade . . . and were accomplished and were brought about by contracts, agreements and understandings between the Publisher and plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner, and the acts done pursuant thereto were in violation of and contrary to Sections 1 and 2 of Title 15, U. S. C. A. . . ."

The colloquy at R. 110 (footnote 4, opinion R. 149) concerning the amendment is incomplete; and in the Court of Appeals, respondent filed a Supplemental Record (R. 143) showing the continuation of the colloquy as follows (R. 144):

"Mr. Hocker: What are you going to do with the words 'contract, agreement or understanding' that

appear in Paragraphs 18 and 19? Are they deleted or left in?

"Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

The dismissal of Count I and the amendment to the complaint were made months after the motion for summary judgment had been filed and ruled on (R. 139, 140, 141).

The Supplemental Complaint (R. 12) lodged December 10, 1964 (R. 139), filed February 12, 1965 (R. 140), both being after petitioner had "sold" his route (R. 12), merely added additional damages on account of respondent's actions since the filing of suit. It did not affect petitioner's pleaded theory of the case (R. 12, 13).

SUMMARY OF ARGUMENT.

I.

Petitioner's stated "Question Presented" is not before the Court, and the only relief he prays for cannot be granted; because this Court has no jurisdiction over the subject matter of the claim, nor jurisdiction to afford the relief prayed for. Jurisdiction is predicated solely upon 15 U. S. C. 15; and that statute having been enacted, and this action being brought in major part for punishment on account of the commission of a federal crime, the statute is unconstitutional, both in general, and particularly as applied in the circumstances of this case, under U. S. Constitution, Art. II, §§ 1, 2 and 3; Amendment IV; Amendment V, clauses 2, 3 and 14; Amendment VI; Amendment VII; and Amendment VIII. The statute, as applied, would deprive this defendant (it being threatened with punishment through governmental action for a criminal offense): of its right to prosecution only by the President of the United States or an officer commissioned by him, of its right to petition for executive clemency, of its right not to be searched except upon oath, of its right not to be twice put in jeopardy, of its right not to be compelled to witness against itself, of its right to jury trial, and of its right not to be subject to excessive fines or unusual punishment.

II.

Petitioner's stated "Question Presented" is not before the court, nor can the relief prayed for be granted; because the relief sought, that is, a judgment notwithstanding the jury's verdict exonerating defendant,

(a) is predicated in this court upon grounds not within the scope of his claim for relief nor of his motion for directed verdict in the trial court; and

(b) is predicated upon proof "as a matter of law" of seven antithetical and alternatively pleaded allegations; the proof of the truth of one being *ipso facto* proof of the untruth of the other six.

III.

Under the facts of this case, petitioner failed to show such a combination as that which he pleaded, after the close of all the evidence, by amendment to his complaint, that is, between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner". More particularly, he did not prove any such combination "and/or" combinations *as a matter of law*.

Petitioner's assertion that a Sherman Act violation can be proved (and that it was here proved, as a matter of law), solely by showing coercion upon a customer (petitioner) by a seller (respondent) "not acting in agreement, concert or common purpose with anyone" is not the law. The statutory words "contract, combination in the form of trust or otherwise, or conspiracy" require that there be a common purpose, at the least, of two traders to restrain trade.

ARGUMENT.

I.

The Court Lacks Jurisdiction to Grant the Relief Sought.

In his brief, petitioner demands only the following specific relief in this Court:

“Petitioner respectfully prays the Court to reverse the decision below and direct that judgment be entered for petitioner Albrecht on the matter of liability, and a trial be had on the amount of damages resulting from the unlawful solicitations and the unlawful termination.” Pet. Br. 32.

But such an order as this, in a privately prosecuted action for the infliction of a statutory penalty (treble the damages found by the jury) for the commission of a federal crime, after the acquittal of the defendant by a jury in a previous trial of the same issues, is beyond the jurisdiction of this Court, because of the unconstitutionality of the statute conferring jurisdiction, under the following provisions of the United States Constitution:

Article II:

Sect. 1: “The executive power shall be vested in a President of the United States of America.”

Sect 2: “The President . . . shall have power to grant reprieves and pardons for offenses against the United States.”

Sect. 3: “. . . he shall take care that the laws be faithfully executed, and shall commission all officers of the United States.”

Amendment IV:

“ . . . no warrant shall issue but upon probable cause, supported by oath and affirmation, and par-

ticularly describing the place to be searched and the person or thing to be seized.”

Amendment V:

Cl. 2: “. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”

Cl. 3: “. . . nor shall be compelled in any criminal case to be a witness against himself”

Cl. 4: “. . . nor be deprived of life, liberty, or property, without due process of law”

Amendment VI:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury”

Amendment VII:

“. . . no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of common law.”

Amendment VIII:

“. . . nor [shall] excessive fines [be] imposed, nor cruel and unusual punishment inflicted.”

Since respondent's argument in support of its assertion of no jurisdiction is available to the Court in the presently pending Respondent's Motion to Dismiss for Want of Jurisdiction, which we now incorporate into this brief by reference, we shall not repeat it here.

II.

The Errors Alleged as Grounds for Reversal Are Not Available to Petitioner on His Own Pleadings.

Petitioner's tendered Question Presented reads as follows (Petition, p. 2, Br. 2):

“Whether as a matter of law a newspaper’s actions of soliciting away the customers of one of its independent-merchant carriers in order to induce him to comply with its suggested resale price, and then terminating sales to him for his continued refusal to agree to comply are in violation of Sec. 1 of the Sherman Act.”

The only relief asked by petitioner reads as follows (Br. 32):

“Petitioner respectfully prays the Court to reverse the decision below and direct that judgment be entered for Petitioner Albrecht on the matter of liability, and a trial be had on the amount of damages resulting from the unlawful solicitations and the unlawful termination.”

In this Court, therefore, petitioner, under Supreme Court Rule 40.1 (d) and (h), presents the single question of whether on the record made below he is entitled to judgment n. o. v. on liability.

It follows that all claimed procedural errors presented to the trial court or to the Court of Appeals are now abandoned, including the criticism of that portion of the charge to the jury which required a “common purpose” between defendant and its unidentified co-combinee. It is petitioner’s entire position here that there was nothing for the jury to decide. Similarly, petitioner’s motion for summary judgment is not before this Court, since it was based upon a complaint which was subsequently amended, not once, but twice. The question of his right to judgment on the abandoned complaint is simply moot.

Therefore, except for the claim for judgment n. o. v. on liability, the several assertions of error set out at the end of petitioner’s Summary of Argument (Br. 13) are surplusage.

A. Petitioner's Brief, Sections III, IV, V.

The major thrust of petitioner's brief here (Sections III, IV and V) is that the combination shown to exist as a matter of law could and did "consist of the seller and his coerced customer", i. e., *Albrecht* (Br. 23). He coins the phrase "antagonistic-coercive relationship between buyer and seller", and treats such a relationship alone as enough to form a combination violative of 15 U. S. C. 1.

In the Summary of Argument he states his proposed rule as follows (Br. 13):

"However, in retail price maintenance cases, an unlawful 'combination' can consist of an antagonistic-coercive relationship between the seller, not acting in agreement, concert or common purpose with anyone, and the buyer."

His "Question Presented" contains no hint of the existence of any contract, agreement, understanding, combination, coercion or of any participation by anyone other than the "newspaper" itself (Br. 2); and the relief he seeks (Br. 32) would allow recovery for damages caused not by any cooperative action, but by the respondent's unilateral solicitations and unilateral termination.

We will discuss this novel theory of the statute under part III; but on the pleadings on which *this* case was tried, the question is moot.

Reference to section B of our Statement of Facts shows that plaintiff's *pleaded* claim was predicated throughout,—from the filing of the suit until the verdict was rendered,—upon a combination of the defendant with:

(a) Some person or persons *other than plaintiff*, whose combination was

(b) Accomplished and brought about by contracts, agreements and understandings between defendant and the same person or persons.

(a) The complaint, until the last-moment amendment, alleged (conspiracy as well as) combination between the respondent and "a person or persons unknown to plaintiff" (R. 7). Of all the persons in the world the only one who could *not* have been "unknown to plaintiff" is the plaintiff himself. After the amendment, the combination was alleged to have been with "plaintiff's customers, and/or Milne Circulation Sales, Inc. and/or George Kroner". None of these could be the plaintiff, any more than could the "person unknown" or the "said third person or persons" (Par. 15, R. 5) of the original pleading.

(b) The allegations of Paragraph 18 of the complaint that "During all of said times the Publisher has entered into contracts, agreements and understandings" (R. 6), and those of Paragraph 19 that the actionable combinations were "accomplished and brought about by contracts, agreements and understandings between Publisher and plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner," were deliberately retained. At the time the amendment was being considered respondent's counsel asked a question which petitioner's counsel answered as follows (R. 144):

"Mr. Hoeker: What are you going to do with the words 'contract, agreement or understanding' that appear in Paragraphs 18 and 19? Are they deleted or left in?"

"Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

In his charge (R. 125) the Court, taking into account Mr. Siegel's statement as well as the amendment, withdrew from the jury's consideration the allegations of conspiracy and collusion, and the allegation of contracts or agreements as illegal *per se*, and the allegation that con-

spiracies were accomplished and brought about by illegal contracts or agreements. Petitioner made no objection to this portion of the charge (R. 112).

Applying this interpretation to the amendment, we have left the allegation that the *combinations* were accomplished and brought about by contracts, agreements and understanding between respondent and the alternatively pleaded co-combinees, "plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner".

It follows that petitioner's proposition:

"that an unlawful combination can consist of the seller and his coerced customer..." (Br. 22).

is just not within the scope of his pleadings in this case. This was not—and, indeed, is antithetical to,—the predicate of petitioner's claim for relief before the trial court, and hence cannot be the basis of a judgment *n. o. v.* in this Court.

Gilby v. Travelers, 248 F. 2d 794;

Fanchon & Marco, Inc. v. Paramount Pictures, 215 F. 2d 167 (cert. den.), 348 U. S. 912, 75 S. Ct. 293.

As the Court of Appeals held (R. 156):

"This was the plaintiff's theory of the case and the only basis of recovery upon which the case was tried and upon which plaintiff's counsel argued to the jury."

The question of whether a Sherman Act combination can consist only of a "seller not acting in agreement, concert or common purpose with anyone and the buyer" (Br. 13) may be an interesting one; but the question, on this record, does not present the case or controversy upon which Federal jurisdiction must depend under U. S. Const., Art. III, Sec. 2. It was simply not pleaded below.

B. Petitioner's Brief, Sections I and II.

It follows that, on the record he made below, petitioner may only show here what he undertook to show below (R. 158, footnote) and what he seeks to show here in Sections I and II of his brief "as a matter of law": that there was a combination between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner".

But this, by the very nature of the allegation, he cannot do. Even though this allegation is not "fairly comprised" in petitioner's question Presented, (Rule 40 (d), we will discuss the evidence on this issue under part III of this brief. For the purpose of this point, we wish only to demonstrate that such an allegation as this could never support a directed verdict.

The disjunctive "or", by definition, postulates alternatives. Petitioner's pleading submits alternatives thus: The co-combinee was "plaintiff's customers" (but not Milne or Kroner), *or* Milne (but not the customers or Kroner) *or* Kroner (but not the customers or Milne) *or* the customers plus Milne (but not Kroner), etc., etc. Plaintiff had 1201 customers (R. 38). Just taking the "customers" allegation as an integer, there are seven possible alternative combinations pleaded: a, b, c, ab, ac, bc, or abc.

In Moore Federal Practice, 2d Ed., Vol. 2-a, pages 1888, 1889, 1890, the author has said:

"Alternative or hypothetical pleading by its nature is inconsistent. This, however, is not a valid objection to it under Rule 8 e . . .

* * * * *

"The inconsistency may lie either in the statement of the facts or in the legal theories adopted, and the party will not be required to elect upon which legal

theory he will proceed since this would defeat the whole purpose of allowing any inconsistent pleading.”

Thus, alternative pleadings and even alternative submissions are permissible under Rule 8 e 2, F. R. C. P.; because a given set of proved facts may support one or more hypothetical findings by the trier of the facts, where reasonable minds can differ as to the conclusion to be drawn from the facts. Cf. Form 10, F. R. C. P.

But the very hypothesis of an alternative pleading,—that reasonable minds can differ,—excludes the only predicate of a directed verdict,—that reasonable minds cannot differ. Muldrow v. Daly, 329 F. 2d 886; Nelson v. Brames, 253 F. 2d 381.

It follows that the purpose of the alternative pleading rule is subserved by the alternative submission to the jury, as the finder of the ultimate fact. The rule has no application to a motion for a directed verdict or for judgment n. o. v.

The proof of this is that Rule 50 (b), F. R. C. P., requires that:

“A motion for directed verdict shall state the specific grounds therefor.”

This requirement, say the courts, is *mandatory*. Budge Mfg. Co. v. U. S., 280 F. 2d 414.

In Eisenberg v. Smith, 263 F. 2d 827, 829, the request to charge was, “On the basis of the evidence and the applicable law, you are directed to find a verdict for the plaintiffs.” The Court held:

“This request, thrown in along with a considerable list of points for charge, is not, we think, a compliance with the rule as stated in Section 50 (a) and quoted above. It certainly gives the trial judge no

hint of what the position of the party making the motion is except that he wants the lawsuit decided in his favor. The purpose of the rule requiring the stating of grounds is, of course, to let the trial judge and opposing counsel see what the problem is so that the decision will be the best that can be had. 5 Moore Federal Practice, § 50.04, p. 2321 (2d Ed. 1951); Virginia Carolina Tie & Wood Co., Inc. v. Danbar, 4 Cir., 1939, 106 F. 2d 383, 385; Ryan Distributing Corp. v. Caley, 3 Cir. 1945, 147 F. 2d 138, 140."

Petitioner said in his motion for directed verdict (R. 104):

"The evidence in this case conclusively establishes and proves the allegations contained in Plaintiff's Complaint."

But which of the inconsistent, alternative, and vital allegations of combination was conclusively proved? Which did the trial court err in not having found, as a matter of law? Was it that defendant combined with plaintiff's customers, but not with Milne Circulation Sales, Inc., nor with George Kroner? With a, but not with b, c, ab, ac, bc or abc? With b, but not with a, c, ab, ac, bc or abc? With c, but not with the others? With ab alone? ac? bc? abc?

Neither in his motion (R. 103) nor in his argument on his motion (R. 104) did petitioner state which of the many alternatively pleaded combinations he thought he had proved as a matter of law.

Thus the ground of the motion for directed verdict is not only in default of the mandatory requirement of the rule, it is patently, manifestly false. One cannot prove, by the same evidence, and establish conclusively, all of seven mutually contradictory ultimate facts.

A Court's determination of a fact, as a matter of law, requires that there be only one possible finding of fact under the pleading and proof. Such cases exist, but this is not one of them. Neither in the trial court nor in the Court of Appeals, nor even at the end of the road in this Court, does petitioner assert which, of the alternative combinations he pleaded, he thinks he proved as a matter of law, and which he claims the trial court should have declared to exist as a matter of law.

Irrespective of his proof, and irrespective of the state of anti-trust law, petitioner was not, under his pleadings, entitled to a directed verdict on either theory advanced in this Court, viz., that there was, as a matter of law, a Sherman Act combination between respondent and petitioner; or that there was, as a matter of law, a Sherman Act combination between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."

The "Question Presented" is therefore not before the Court on this record and the writ should be dismissed as having been improvidently granted. *Tyrrell v. District of Columbia*, 243 U. S. 1.

III.

The Record Does Not Show a Violation of the Act as a Matter of Law.

At the outset we must recall that the ultimate question of whether respondent was party to a combination *vel non* was tried out with care and deliberation before a jury, and that the jury found that there was no such combination proved. We must also remark again that the only question raised here is petitioner's right to a judgment in spite of the jury verdict. In this court, no error of procedure or instructions is raised, because the Question Presented by petitioner's brief does not fairly comprise

therein anything but the right to his claimed judgment, Rule 40.1 (d) (1); nor does the relief he requests under Rule 40.1 (h), i. e., a judgment n. o. v. (Br. 32), by any interpretation, contemplate a remand for a new trial,—the only remedy for a procedural error.

In this situation the limitation of this court's function is that stated by this court in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412:

“Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.”

With this rule of law before us, we must examine whether the only reasonable conclusion to be drawn from the record made below is such that a judgment for petitioner is required. Let us turn now to the question.

Petitioner concedes, under the rule of *U. S. v. Colgate*, 250 U. S. 300, that if the respondent had announced a retail price at which its papers must be sold “and then declines to sell to those who fail to adhere to the policy, he has not put together a combination in violation of the anti-trust laws” (Br. 21). But petitioner bases his argument for not applying the rule of *Colgate* here upon the sentence of the opinion in *U. S. v. Parke, Davis & Co.*, 362 U. S. 29, 44, 80 S. Ct. 503, 512:

“When the manufacturer's actions, as here, go beyond mere announcement of his policy, and the simple refusal to deal, and he employs other means which affect adherence to his retail prices, this countervailing consideration is not present, and therefore he has put together a combination in violation of the Sherman Act.”

Unlike *Parke, Davis*, respondent in this case did not go beyond a simple refusal to deal.

The concept of "going beyond" necessitates the possibility of "stopping short of". We think the record shows plainly that the actions of respondent, whether or not considered as a part of a combination, did not "go beyond", but "stopped short of" a simple refusal to deal. As the Court of Appeals put it:

"At this juncture, Globe-Democrat had not gone so far as to decline to sell" (R. 156.)

In this relationship plaintiff enjoyed an exclusive territory, so long as he observed the suggested maximum price (R. 39, 57, 58). This was not the case in Parke, Davis or Lessig, or Osborn.*

Plaintiff had paid the previous carrier for this route *eleven thousand dollars*, and had mortgaged his home to buy it (R. 22). He had had only an eighth grade education, and had had only milk route, bread route, odd job and farm work experience (R. 21).

In the case of Albrecht and the Globe-Democrat a "simple refusal to deal" would not have been so simple. It would have been, for Albrecht, catastrophic: a total wipe-out, with his \$11,000 investment gone with the wind. One can hardly coerce a hold-up victim any harder than by shooting him dead before robbing his pocket. Petitioner says this course would have been legally open to the respondent (Br. 21).

Instead, respondent competed with him by selling in his territory at the suggested retail price, *and continued to*

* United States v. Parke, Davis & Co. (1960), 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505; Lessig v. Tidewater Oil Co., (C. A. 9, 1964), 327 F. 2d 459, cert. den. 377 U. S. 993, 84 S. Ct. 1920, 12 L. Ed. 1046; Osborn v. Sinclair Refining Co. (C. A. 4, 1963), 324 F. 2d 566; Osborn v. Sinclair Refining Co. (C. A. 4, 1960), 286 F. 2d 832.

sell to Albrecht at wholesale the newspapers with which he maintained his trade.

Even after Albrecht brought his treble damage suit, as a result of which the Globe-Democrat did at last unilaterally refuse to deal (R. 48, 148), the respondent *even then* gave Albrecht sixty days to sell his route (R. 48) and, at his request, an additional extension of ten days (R. 49), so that he was able to sell his route, at a profit, for twelve thousand dollars (R. 71).

To argue that a jury *had to* find that such conduct was *going beyond* a simple refusal to deal rather than *stopping short of* a simple refusal to deal is simply to ignore the facts of commercial life and of the contexts of the cases petitioner relies upon.

Petitioner's position in this Court is twofold: A. That he did prove a combination including a "common purpose" between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner" as a matter of law (Br. I, II); and B. That no showing of common purpose is necessary under the law because a combination existed between respondent and Albrecht as a matter of law. Br. III, IV, V.

Neither position is properly before this Court; because position A is by no means "fairly comprised" in the question Presented, and position B was not fairly comprised in the complaint on which the case was tried in the District Court. Further, neither position is borne out by the facts or the law.

A. Petitioner's Brief, Sections I and II.

According to the complaint, as amended following completion of the evidence, the persons defendant (respondent) was alleged to have combined with were (R. 110, 111):

"...plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner."

This is what the complaint alleged at the time the motions for directed verdict and for judgment n. o. v. (the only basis for reversal urged in this Court) were submitted and ruled on (R. 142).

This Court declared in *U. S. v. Parke, Davis & Co.*, 362 U. S. 29, 44, 80 S. Ct. 503, 512:

“The Sherman Act forbids *combinations of traders* to suppress competition.”

The prohibited combinations are combinations, as the Court says of *traders*. Not, that is, of employer and employee, master and servant, nor of seller and consumer, but of two or more *traders*.

The first alternative co-combinee alleged is “plaintiff’s customers”.

A consumer-customer is by definition not a trader. Petitioner has not cited a single case in support of his position in which a Sherman Act combination was held to exist between a seller and an ultimate consumer. We have found no such case, nor any case, than this, in which such an assertion was made.

The second alleged co-combinee was “and/or Milne Circulation Sales, Inc.” This was an independent contractor employed generally by respondent to solicit subscriptions to its newspaper by two means, telephone and door-to-door (R. 64).

On May 20, 1964, respondent announced to Albrecht that it would begin to compete with him (R. 8) and enclosed a solicitation letter which was to be sent to every resident of his territory (R. 9). Two days later, on May 23, 1964 (R. 91), Milne Circulation Sales, Inc. commenced soliciting residents in Albrecht’s territory on the telephone by means of a reversed directory. Milne was given explicit instructions by respondent as to what to say (R. 65). After the telephone solicitation, some boys were hired at the

direction of respondent to do door-to-door solicitation (R. 69-70). Since a corporation cannot act except through a human agency, the trial court excluded, without objection of petitioner, the possibility of a combination of a corporation with any of its agents or employees (R. 122-123). Milne, under the petitioner's own evidence, was merely an agent. It was in no sense a trader.

In the case of Albrecht's customers, if the person solicited was paying more than the suggested retail price, Milne would assure him he could have the Globe-Democrat delivered at the regular price. If the customer was willing, Milne made out an order form and sent it to the respondent (R. 68). This was all. Milne's manager, McDowell, was plaintiff's witness, and his testimony was uncontradicted. Milne merely conveyed respondent's message for a fee, as any employee could have done.

It is as far a fetch to claim that respondent combined with Milne, in the Sherman Act sense, as it would be to claim such a combination with the United States Post Office Department, because for a fee it carried respondent's mailed solicitations.

Neither Milne nor the Post Office was a trader.

Lastly, petitioner asserted a combination with "and/or George Kroner". George Kroner, alone of the alleged co-combinees, was a trader in newspapers.

But there was no evidence of an agreement with Kroner, and utterly no evidence that anything that Kroner did had anything to do with petitioner's asserted damage. Kroner, called as petitioner's witness, testified that he answered respondent's advertisement and took over delivery to the 314 daily and 260 week-end subscribers (R. 73). He never solicited any persons to become his customers on this route (R. 79). He had previously been a Globe-Democrat carrier (R. 72) and had only a verbal understanding with them "That I was to handle that the

same as I did Route 48. I was to pay my bills weekly and bill the customers according to the prescribed rate" (R. 74). At this time he was not told the prescribed rate; as he already knew it (R. 74). He had previously been told that the Globe-Democrat would not tolerate overcharging the customers (R. 75).

This was no more than the unilateral declaration of unilateral policy permitted by the Colgate rule, and knowing the policy Kroner took on the new route and customers.* Kroner was petitioner's witness, not respondent's, and on direct examination he categorically denied soliciting any customers of Albrecht (R. 79).

Now the charge urged by petitioner below (Plaintiff's Requested Instruction No. 16, R. 113) requires that the combination be one beginning "on or about May 20, 1964". Kroner, a witness called by petitioner, had nothing to do with the matter until July, when he saw the respondent's advertisement in the newspaper (R. 75). Thereafter, all he did was to deliver to the customers on the list given him by the Globe-Democrat, at the regular subscriber's rate, from the middle of July, 1964 (R. 78) until December, 1964 (R. 80), when he sold this route to Schwarzenbach (R. 80), who had bought Albrecht's route the previous September 25 (R. 51, 52).

There is no evidence whatever that Kroner ever combined in any way with respondent. He acquired the customers from it *after* respondent had obtained them by price and service competition. And he was not shown to have had anything whatever to do either with the customer

* Petitioner concedes that there was no policing or other coercion of Kroner or of any other carrier. In his Court of Appeals brief, p. 9, petitioner said: "Other than in the case of Plaintiff, the Publisher has taken no other steps to enforce maintenance of the suggested retail price, except to contact carriers, whose subscribers have called to the Publisher's attention the fact that carriers were not charging defendant's suggested price, and then the Publisher requested them to do so."

solicitation or with Albrecht's termination by respondent in November, 1964, which was the subject matter of the Supplemental Complaint. But these two actions—solicitation and termination—are the only actions for which petitioner seeks recovery here:

“Plaintiff respectfully prays . . . a trial be had on the amount of damages resulting from *the unlawful solicitation*, and *the unlawful termination*” (Br. 32).

B. Petitioner's Brief, Sections III, IV, V.

Finally, we turn to petitioner's unpleaded proposition that an anti-trust violation can consist of coercion of a buyer by a seller “not acting in agreement, concert, or common purpose with anyone”, Br. 13. For reasons we have already stated (Point IIA, *supra*), we feel this proposition is not presented by this record. For reasons we shall now state, we feel this proposition is entirely without supporting authority.

The statute, for violation of which this action was brought (Br. 2), reads (15 U. S. C. A. 1):

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

Under normal rules of statutory construction, the word “combination” must take coloring from its companions “contract” and “conspiracy”. Thus since “contract” and “conspiracy” require a meeting of human minds, the word “combination”, having been uttered by Congress in the intimate context of these two words, will, under the rule of *noscitur a sociis*, be construed in this sense, too; rather than in, say, the proximate cause sense, where a “combination” might exist between a person, and a beast, an inanimate object, or an Act of God. 82 C. J. S., Statutes, § 331.

The same rules of construction require that interpretative effect be given to the modifying phrase "in the form of trust or otherwise". Not all combinations are proscribed by the act,—only those "in the form of trust or otherwise". The word "otherwise" cannot be construed to vitiate the modifying effect of the whole phrase without casting out as meaningless an entire phrase which Congress deliberately inserted, intending that it convey some meaning, 82 C. J. S., Statutes, p. 712 et seq. The normal and the only reconciling meaning possible for the word "otherwise" is so as to include combinations *ejusdem generis*, i. e., *like those* "in the form of trust", as the word "trust" was used in the discussion of trade or commerce at the end of the nineteenth century. 82 C. J. S. Statutes, p. 332 b. And an "otherwise combination" could scarcely be *like* a "combination in the form of trust", unless it had, as an irreducible minimum, at its core, a meeting of the minds of persons engaged in trade with respect to the same commodity or service.

Applied to this statute the rule of *nosictur a sociis* requires, to fall within the prohibition, that one person have some sort of meeting of the minds with another, i. e., some sort of "common purpose". This is the lowest common denominator of the three correlatives. The Courts have used various synonyms to indicate prohibited agreements of greater or lesser formality, but these quasi-synonyms all are referable back to the statute in terms of this least common denominator. "Agreement": *Simpson v. Union Oil Co.*, 377 U. S. 13, 24, 84 S. Ct. 1051, 1058. "Arrangements": *Lessig v. Tidewater Oil*, 327 F. 2d 467; and *Osborn v. Sinclair Oil*, 324 F. 2d 566, 573. "Entwining", "Wholesalers' participation", "Willingness to go along", "Acquiescences", "Abide by", "substantial unanimity", "Concerted Action", etc., *U. S. v. Parke, Davis*, 362 U. S., l. c. 37, 45, 46, 47, 80 S. Ct., l. c. 508, 512, 513.

But to date no decision of any court of which we are aware has dispensed with the minimal requirement of the statute that there must be some sort of meeting of human minds to effect a prohibited restraint of trade. Of all the synonyms for "contract, combination . . . or conspiracy" which the lexicographers authorize, it seems to us the broadest and mildest,—the most informal expressible—is the "common purpose" employed in the charge in this case.

This is the way the trial court put it (R. 126):

"A combination is a concerted course of action between the defendant and one or more persons. This may be with an agreement either expressed or implied or it may be without an agreement. In order to have a combination there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means."

This is really no different from petitioner's own theory and requested submission at the trial. While he objected, almost offhandedly, to the use of the phrase "a common purpose" (R. 112), the legal effect of his offered instructions was the same.

In the instructions he submitted appear the following findings:*

No. 16 (R. 114): "the pressure resulting from the fact that the Defendant and Krøner, *by concerted action*, were preventing the Plaintiff . . ."

* "Concert of Action" in appellant's phraseology is synonymous with the phrase "common purpose". (App. Br. in Ct. of App.):

App. Br. 48. "... common purpose or concert of action is not and cannot be a necessary element . . ."

App. Br. 51. "... Tidewater and Lessig did not have any element of concert of action or common purpose . . ."

App. Br. 51. "... 'combination' under Section 1 of the Sherman Act can arise without any element of common purpose or concert of action . . ."

App. Br. 56. "... regardless of whether any common purpose or concert of action, agreement or conspiracy existed . . ."

No. 17 (R. 115): "if you find that the Defendant was able to withhold these customers and new starts from the purchaser of Plaintiff's Route only because of the *combination or concerted action* with Kroner, Plaintiff's Customers and Milne Circulation Sales, Inc. . . ."

No. 18 (R. 116): "If you find that the Defendant did violate Section I of the Sherman Act by entwining Milne Circulation Sales, Inc., the customers of the Plaintiff and Kroner *in a combination or concert of actions* . . ."

Thus petitioner's own offered submission required the same finding of an understanding, concerted action or common purpose, which he now claims it would be evil to require and would result in the destruction of the competitive system (Br. 30).

The interpretation of the statute thus given by the Court below is no different from that given by the petitioner himself and the authorities. The idea of a single-handed combination is an inherent paradox. The concept is a contradiction in terms—a *felo de se*.

The only things which are declared illegal by Section 1 of the Sherman Act are contracts, combinations or conspiracies in restraint of trade. Economic coercion as such is not referred to in the statute. To be illegal the "coercion" must take the form of a contract, combination or conspiracy. In the first Osborn case (286 F. 2d 832, 839, cert. den. 366 U. S. 962), the Court, relying on Colgate, noted that:

"Even where a manufacturer or supplier has a policy aimed at a result which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or

combination, refuse to deal with a purchaser in accordance with the announced policy.”

This position was reiterated most recently in *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 4th Cir., CCH 1967, Trade Cases, § 72135, ... F. 2d

There is nothing in Parke, Davis or any of the other cases cited at pages 22 and 23 of petitioner's brief which detracts from the continued validity of this statement.

Petitioner bases his argument that an unlawful combination can arise, although having no other participants than the manufacturer and the “coerced” dealer, upon the following statement from Parke, Davis:

“When the manufacturer's actions, *as here*, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act” (Emphasis added).

The above statement, however, may not be taken out of context. The key words are “as here”. The facts of Parke, Davis disclose that the decision turned on the existence of an unlawful combination between Parke, Davis and its wholesalers to force the retailers to comply with the suggested retail prices. Indeed, the majority opinion expressly states that this was the basis for the decision. Thus, the Court stated:

“In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, *Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices* and violated the Sherman Act. Although Parke Davis' originally announced wholesaler's policy would not under Colgate have violated the Sherman Act if its

action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the 'vice of . . . illegality,' cf. *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 724, when Parke Davis used it as the vehicle *to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.*"

Osborn, Lessig and Englander Motors, all cited on page 23 of petitioner's brief, each involve an illegal contract or agreement. *George W. Warner & Co.* involved merely the sufficiency of the plaintiff's pleadings; it was not a decision on the merits.

Simpson v. Union Oil Co., discussed at pages 28 and 29 of petitioner's brief, best illustrates the point that more than mere economic "coercion" must be shown in order to establish a Section 1 violation. There must be a showing of either a contract, combination or conspiracy. In *Simpson* there was no showing of combination or conspiracy. The violation was found to be the *unlawful agreement* which was "coercively employed". Absent the agreement, there would have been no violation. The Court makes this clear, for the majority opinion notes in two places (377 U. S., p. 17 and p. 24) that there was an agreement which was "used coercively". The Court said:

"Hence on the issue of retail price maintenance under the Sherman Act there is nothing left to try, *for there was an agreement for resale price maintenance, coercively employed.*"

But we have shown that petitioner conceded that no such agreement as *Simpson* condemns existed in this case as to "plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner" (R. 144).

And the petitioner himself said out of his own mouth (R. 61):

“Never had I agreed to that statement of policy. I had to deliver newspapers because of my investment, but never had I agreed to that statement of policy. Being an independent merchant I have the right to set my prices.”

Therefore, even if we were to ignore the requirements of the Constitution, and even if we were to ignore the record of petitioner's pleadings and submission in the trial court, unless Colgate is to be overruled and the statute revised, petitioner simply did not, as the Court of Appeals held, produce any evidence upon which to predicate a finding of “combination in the form of trust or otherwise”. And by no stretch of justice is he entitled to a judgment in derogation of the jury's finding that no such combination existed.

The writ should be dismissed.

Respectfully submitted,

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FILED
OCT 16 1967

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 43.

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

RESPONDENT'S MOTION TO TRANSFER CASE FROM
SUMMARY CALENDAR TO REGULAR CALENDAR.

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Respondent.

**RESPONDENT'S MOTION TO TRANSFER CASE FROM
SUMMARY CALENDAR TO REGULAR CALENDAR.**

Respondent moves that the Court set this case on its regular calendar rather than on the summary calendar.

For grounds of its motion respondent states:

1. On October 9, 1967, the Court ordered that respondent's motion to dismiss for want of jurisdiction be postponed to the hearing of the case on the merits.
2. The time allowed counsel for argument on the summary calendar under Rule 44(3) is sufficient for discussion of the case on the merits, but is insufficient for a discussion both of the merits and of the matters raised in respondent's motion as well.

3. The questions raised in the motion are of vast importance not only to present and inevitable future litigation, but to fundamental concepts of government under the United States Constitution; they must be passed upon by the Court before reaching the merits; and the Court should have the benefit of counsel's argument thereon before deciding them.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I.

There Is No Constitutional Defect in Jurisdiction.

Respondent's argument (Resp. Br. 8-9) that the Court lacks jurisdiction herein because the treble-damage provision of the antitrust laws is unconstitutional was shown to be without merit in Petitioner's brief in opposition to the motion to dismiss. The extremely serious effect of sustaining the motion is shown by a recent report of Warren Olney III, Director of the Administrative Office of the United States Courts. In fiscal year 1967 there were 536 new private antitrust suits. In the same year

government enforcement resulted in the filing of only 39 civil and 16 criminal suits. Trade Regulation Reports—Number 328, p. 3, Oct. 9, 1967.

II.

Petitioner's Right to Reversal Is Not Nullified by Any Pleading Defect.

Respondent's contention (Resp. Br. 10-17) that grounds for reversal are not available to Petitioner because of a pleading defect is wholly without merit. The day is gone when the pleader had to select the right legal theory at his peril. Under modern practice the purpose of the complaint is to provide the defendant with fair notice in order that he can answer and prepare for trial, Moore's Federal Prac., 2d Ed., Vol. 2-a, Par. 8.13. The complaint should state what happened; the court will apply the law to the facts, Moore's Federal Prac., 2d Ed., Vol. 2-a, Par. 8.12.

Every fact proved and relied upon by Petitioner at every stage in his requests for a judgment of liability as a matter of law was alleged in the complaint, as will appear from a comparison of paragraphs 4-15 of the original complaint (R. 2-5) and paragraph 1 of the supplemental complaint (R. 12) with Petitioner's refused instructions 16 and 17 (R. 113-115) which direct a finding of liability if the hypothesized facts are found. The facts alleged in paragraphs 4-15 were repeated and re-alleged in paragraph 17, the first paragraph of Count II, and were not lost when Count I for tortious interference with business relations was dismissed (R. 6, 20, 141).

Legal theory is revealed in motions and arguments to the court. Petitioner's legal theory was that the relationships between the Globe-Democrat and Milne Circulation Sales, petitioner's customers, and Kroner constituted combinations or conspiracies in violation of Section 1 of the

Sherman Act; but that in any event the Globe-Democrat by going beyond prior announcement and mere declination and engaging in other actions to effect adherence, entwining others with it in doing so, had as a matter of law created an unlawful combination between itself and petitioner. This theory of law clearly appears in Petitioner's motion for a directed verdict (R. 105). It is clear in Petitioner's objection to that part of the court's charge which defined "combination" as requiring an element of common purpose, and in Petitioner's refused instructions 25, 26 and 27 (R. 113, 119-120). It clearly appears again in Petitioner's motion for judgment n. o. v. (R. 135).

When the court, in conference on instructions declined to accept Petitioner's legal theory on "combination," Petitioner elected to go to the jury only on the issue of combination in order to eliminate from the court's instructions the further emphasis on common purpose contained in conspiracy instructions (R. 111, 141). This created a discrepancy between a complaint alleging conspiracy and combination and instructions based only on combination. It was for this reason that the court required Petitioner to amend the complaint if conspiracy instructions were to be stricken from the charge. The substitution of "plaintiff's customers and/or Milne Circulations Sales, Inc. and/or George Kroner" for "... a person or persons unknown to plaintiff," made in response to Respondent's objection of vagueness, was incidental (R. 110-111). In any event this change could have no effect whatever upon Petitioner's legal theory that the Globe-Democrat's actions, however it was entwined with these others, created an unlawful combination between it and Petitioner. This changed wording in the complaint certainly could not withdraw that legal issue from the case; and it could not withdraw the alleged and proven facts showing that the Globe-Democrat went far beyond prior announcement and mere declination.

Whether combination was created between Petitioner and the Globe-Democrat, as a result of its actions, is wholly a conclusion of law. To require that a conclusion of law must be pleaded in order to be available as a ground for reversal, especially where as here, it was made a ground for motion for directed verdict, objections to evidence, and motion for judgment n. o. v., would be to defeat the purpose of modern code pleading.

Further, the conclusion of law that an unlawful combination was created between the Globe-Democrat and Petitioner is not "antithetical to" a conclusion of law that unlawful conspiracies or combinations were formed between the Globe-Democrat and others entwined with it (Resp. Br. 13). The latter supplements the former. The independent pricing decisions of the Petitioner are the object of the Sherman Act's protection. It is entirely consistent to adopt the theory that the Act says that these independent decisions shall not be destroyed by actions of others who are joined in combination or conspiracy, and that they shall not be destroyed by actions of others who are not joined in combination or conspiracy if the actions go beyond the narrow limits of customer selection. This, in fact, is what this court has held. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 43.

III.

Going Beyond Prior Announcement and Mere Refusal to Sell Is Unlawful and Can Not Be Excused by Arguments of Lesser Harm to the Buyer.

Respondent argues (Resp. Br. 18-20) that going beyond "simple refusal to sell" and employing "other means to effect adherence to his resale prices," is transformed into "stopping short of" simple refusal to sell because the Petitioner was not hurt as much by being bludgeoned into compliance as he would have been by simple refusal to

sell. In the first place the antitrust law protects the customer's independent pricing judgment. If it were true that the consequences of his standing on that right would be disastrous for him, this fact would not make innocent (and indeed the Respondent seems to feel even praiseworthy) the seller's destructive coercion.

In the second place Respondent engages in obvious misrepresentation as accompaniment for his crocodile tears. A simple refusal to sell would not have wiped out Petitioner's investment in his route, as Respondent alleges (Resp. Br. 19). It would have meant that after a certain date he could no longer buy papers from the Globe-Democrat in order to fulfill the contracts of delivery with his twelve hundred customers. But only Petitioner would have had the right to deliver the Globe-Democrat to those customers. It is these contracts of delivery that the carrier receives when he buys a "route." The carrier to whom the Globe-Democrat has refused to sell papers in the future still owns his route. He is an independent businessman, as the Globe-Democrat expressly stated in its policy regarding news dealers and carriers (R. 56-58). After he has been refused further service a carrier's route is worth a substantial amount of money to another. Petitioner, who had mortgaged his home to buy his route for \$11,000 in 1956 (Resp. Br. 19), could have sold it for \$24,000 after being refused service in 1964, but for the unlawful action of the Globe-Democrat in withholding the 300 customers purloined from him (R. 50). The undisputed facts show that a "simple refusal to sell" would have resulted in the Petitioner receiving \$24,000 for the route that had cost him \$11,000 originally.

Amicus points out (Amicus Br. 2-7) that newspapers have an interest in raising circulation and consequently advertise, promote, and solicit in order to gain new subscriptions which often are transmitted to the carrier through the newspaper (Amicus Br. 3). This is true, but

once the subscription is turned over to an independent merchant carrier the contract of delivery is the carrier's. In the instant case the Globe-Democrat's officers repeatedly said they were not in the carrier business and did not want to be in it (R. 71-76, 83-87, 91-97). Even when the Globe-Democrat took away 300 of Petitioner's subscribers by the actions herein, it asserted no proprietary interest in these contracts of delivery, and gave them without charge to another carrier (R. 96-97, 99). How could it possibly by a "simple refusal to sell" transfer to itself the ownership of all of a carrier's contracts of delivery, and thus "wipe-out" his total investment?

IV.

Petitioner's Submitted Instructions Did Not Agree With the Trial Court's Requirement of an Element of "Common Purpose" in "Combination".

To the extent that Respondent deals with the merits of the issue before the Court (Resp. Br. 24-30), he presents nothing not already covered in Petitioner's brief, except the assertion that Petitioner's own proffered instructions agreed with the trial court's requirement of an element of "common purpose" in "combination". This is false, as is clearly shown by Petitioner's requested instructions 25, 26 and 27, which Respondent neglects to mention (R. 119-120).

V.

Amicus Curiae Wholly Ignores the Undisputed Facts of This Case and States Irrelevant General Rules of Law About Termination, Prior Publication and Alternative Competitive Means of Distribution.

The background facts stated by Amicus (Amicus Br. 4-7) show that newspapers have an interest in increasing readership so that they can charge higher advertising

rates. From that point on it is difficult to see why the American Newspaper Publishers Association asked to file a brief herein since it wholly ignores the facts in this case.

1) Amicus says that a seller may refuse to sell to a customer who has filed suit against him, even if termination is for retaliation (Amicus Br. 8-9). Both of the cases cited premise legality upon the termination not being part of an unlawful conspiracy or combination. **Dart Drug Corp. v. Parke, Davis & Co.**, 344 F. 2d 173 (D. C. Cir., 1965), **House of Materials, Inc. v. Simplicity Pattern Co.**, 298 F. 2d 867 (2d Cir. 1962). The undisputed facts show that the Globe-Democrat's termination was an integral part of coercion resulting in an unlawful combination. Suit was filed Aug. 12, 1964 (R. 1, 47). Notice of termination was given Aug. 21, 1964 (R. 48, 49). On September 15, 1964, the Globe-Democrat continued its attempts to persuade Albrecht to resume delivering its newspaper provided he would agree to charge its suggested price (R. 50-51).

2) Amicus says that prior publication of suggested home delivery prices is not a violation of the Sherman Act (Amicus Br. 9-10). Petitioner has conceded this at every stage, but the undisputed facts show that the Globe-Democrat went far beyond prior announcement and mere refusal to sell.

3) Amicus says that a publisher's use of alternative competitive means of distribution is not restraint of trade (Amicus Br. 10-15). The undisputed facts show that the Globe-Democrat did not compete with Petitioner in the delivery of newspapers and did not authorize anyone else to compete with him. Competition is distinguished from wrongful injury by whether the person taking custom from another has intent to gain profits for himself and to continue in business for himself, and not just tempo-

rarily in order to injure another. Rest. of Torts, § 709; **Tuttle v. Buck** (1909), 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599. It has been recognized that in order for the right to compete to be a defense to a claim of violation of Section 1 of the Sherman Act, the actions must meet the common law and Restatement definition of bona fide competition. **Package Closure Corp. v. Seal-right**, 141 F. 2d 972, 978 (2d Cir. 1944). The undisputed facts show that the Globe-Democrat had not been in the carrier business; did not want to be; had no equipment or employees for the carrier business; had no thought of making a profit from delivering to the customers it took from Petitioner; asserted no proprietary interest in the contracts to deliver to those subscribers; made delivery to them for a very short time on a make-shift basis; turned them over without charge to a carrier for whom it had advertised, with the understanding that he would have to give them back if Petitioner came into line on resale price; and the Globe-Democrat's sole and only purpose was admittedly to force Petitioner to adhere to its suggested resale price (R. 71-76, 83-87, 91-97). The Globe-Democrat was not competing. It did not authorize the other carrier, Kroner, to compete within Petitioner's route. Kroner did not go in and get his own contracts of delivery on the basis of the price and service he offered. The Globe-Democrat took 300 customers from Petitioner as coercion, and turned them over to Kroner in order to continue the coercion, but with the condition that if the coercion worked and Petitioner should "get straightened up" with the Globe-Democrat, Kroner would have to return the 300 customers (R. 71-76). Kroner did no solicitation for customers within Petitioner's route (R. 79).

VI.

Coercion Which Goes Beyond Prior Announcement and Mere Refusal to Sell Is Combinatory, Not Unilateral.

Amicus states that Section 1 of the Sherman Act does not prohibit unilateral action (Amicus Br. 15-19). This is unexceptionable. The question is whether the Globe-Democrat's actions were unilateral. This court has said that when a seller goes beyond prior announcement and mere refusal to sell and employs other means to effect adherence to his resale price policy, his actions are combinatory, not unilateral. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 43. Petitioner has shown that this distinction between unilateral action and unlawful combination is necessary if the purpose of the antitrust laws is to be achieved in resale price maintenance cases (Petr. Br. 24-30).

VII.

The Doctrine of Freedom of the Press Does Not Immunize Respondent's Actions Herein.

Amicus contends that freedom of the press immunizes the Globe-Democrat's actions herein (Amicus Br. 19-21). If there is any violation of the First Amendment here, it was committed by Respondent in interfering with Petitioner's right to deliver newspapers, for it is Petitioner, not Respondent, who is engaged in the business of delivering newspapers.

Amicus' self-serving conclusions that Petitioner's charges were "excessive" (10 cents per month more than Respondent's suggested price) and its contentions that "such overcharging creates chaos in the circulation system" (Amicus Br. 12, 20) (only 6 customers out of 1200 cancelled because of Petitioner's price) are completely at variance with the Record. In any event it cannot be

seriously argued that freedom of the press necessarily includes freedom to set the resale price of newspapers by means that violate the antitrust laws.

VIII.

No Special Facts About Newspapers Take Them Out of the Rule That Price Fixing Is a Per Se Violation of the Sherman Act.

Amicus argues that the peculiar facts of this case, including "the history of newspaper and periodical pricing, the newspaper's effort and investment in the development of subscription lists, the economic importance of pricing policy, the injury to newspapers resulting from low circulation revenue and the relation of circulation volume to advertising revenue . . ." call for non-application of the rule that price fixing is a "per se" violation (Amicus Br. 21-23). The short answer to this contention is that the factual premises on which Amicus relies can not be found in the Record of this case. A more complete answer is that even were such facts to be found in the Record they would not furnish newspapers immunity from conduct proscribed by the Sherman Act.

While it may well be true as Amicus contends that 75% of newspaper revenue is derived from advertising and only 25% from circulation; that a publisher's primary product is advertising and not the paper distributed by the carrier; that advertising rates are governed by circulation; that price increases affect circulation,—nevertheless, these factors do not give newspapers a license to fix or maintain the prices at which independent contractors may sell newspapers which they purchase outright from the publishers and sell to their own customers. That the pricing of newspapers is a critical economic consideration to newspapers furnishes no reason for sheltering them from the reach of the Sherman Act. Nor can Respondent

in truth claim that its actions taken against Petitioner for the admitted purpose of maintaining its suggested retail price were intended to protect consumers by fostering competition—they were clearly for Respondent's own selfish ends. If Respondent determined that its advertising revenues would increase if the carriers of its newspapers sold at a price higher than its present suggested price, can there be any doubt that it would take action to accomplish a higher retail price? There are no unique facts about the home delivery carrier business that would justify removing it from the pervasive sweep of this Court's rule that to fix a price is to restrain trade, without regard to the effect on competition or whether the price is held down supposedly for the benefit of the consumer. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150; **Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.**, 340 U. S. 211.

Amicus contends that a publisher must be free to determine the means by which it will distribute its newspapers. Here Respondent has exercised that right of choice. Prior to May 26, 1961, the carriers were employees of Respondent under a collective bargaining agreement with a union, but Respondent advised the union that it no longer regarded the carriers as employees but that they are independent contractors. Respondent then refused to negotiate a new collective bargaining agreement and the prior agreement expired May 26, 1961, and was never renewed (R. 53-55, 58). Of course, while Respondent was the employer of the carriers it set the price at which newspapers would be sold to subscribers. Now, however, Respondent seeks to continue to fix, control and maintain the prices at which its newspapers are sold to the public even though the carriers are no longer employees but are admittedly independent contractors. This is not an exceptional situation in which the *Globe-Democrat* is in fact acting in the public interest and fostering

competition, but is an ordinary case of vertical price fixing in violation of Section 1 of the Sherman Act.

Respectfully submitted,

By

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State of Missouri, }
County of St. Louis. } ss.

I, Gray L. Dorsey, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 27th day of October, 1967, I served 2 copies of the foregoing Brief for Petitioner on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By

Gray L. Dorsey,
Member of the Bar of the United
States Supreme Court.



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SUPREME COURT, U. S.

No. **43**

FILED

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1966.

LESTER J. ALBRECHT,
Petitioner,

VS.

**THE HERALD COMPANY, a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,**
Respondent.

MOTION FOR REHEARING.

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No. 975.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT,
Petitioner,

vs.

THE HERALD COMPANY, a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

MOTION FOR REHEARING.

Respondent prays the Court to grant it a rehearing in the above cause.

For grounds of its motion, respondent states:

The Court has entered its order in this case without passing upon the question of whether it had jurisdiction to do so. This question was clearly before it, raised by

(a) Respondent's Motion to Dismiss for Want of Jurisdiction;

(b) Respondent's brief, Point I; and

(c) Respondent's Oral Argument.

The Court has ignored, without comment, and presumably without consideration, the constitutional claims of respondent, specified and applied to the circumstances of this case, in a motion and in a brief, each of which conforms in all respects to the requirements of the rules of this Court. Eleven provisions of the Constitution are invoked. Cited and quoted in support of the argument are twenty-seven opinions of this Court, twelve decisions of other courts, and seventeen other authorities. The argument is developed in fifteen sections on thirty-seven pages of suggestions. In the four opinions filed, *not one word* is devoted to the question.

Counsel for respondent, a member of the bar of this Court, signs this motion and these suggestions not only in the representation of his client, but as well as in the assertion of a point of personal privilege:

Is not counsel (who has spent weeks and months of his life in preparing and regularly presenting an extensively developed argument that on constitutional grounds the Court has no jurisdiction to grant the only relief sought by petitioner) entitled to the courtesy (as his client is entitled to the justice), if not of a discussion, at least of a decision, of the question raised?

If procedural due process requires a *hearing*, must it not too require a *decision* on the argument heard?

* * * * *

The Court's record in this matter shows:

July 3, 1967. Respondent's Motion to Dismiss for Want of Jurisdiction with Supporting Brief filed.

July 28, 1967. Petitioner's Brief in Opposition to Respondent's Motion to Dismiss filed.

October 5, 1967. Respondent's Brief filed. Point I thereof is captioned:

"The Court lacks Jurisdiction to Grant the Relief Sought"; the brief sets forth the constitutional provisions relied upon and incorporates by reference the argument of the Motion to Dismiss (page 9).

October 9, 1967. The Court entered an order: "Further consideration of the motion of respondent to dismiss the writ of certiorari is postponed to the hearing of the case on the merits."

October 14, 1967. Respondent's Motion to Transfer Case from Summary Calendar to Regular Calendar filed. This argued (page 2): "The questions raised in the motion [to dismiss] are of vast importance not only to present and inevitable future litigation, but to fundamental concepts of government under the United States Constitution; . . ."

October 23, 1967. The Court ordered: "The Motion of Respondent to remove this case from the summary calendar is denied."

March 4, 1968. Four opinions were filed. The Court ordered: "The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion."

No disposition of the motion has been made!

For aught that the Court's records show, it is still pending. Yet the case is remanded for further proceedings consistent with the principal opinion. Since the Supreme Court did not, in its opinion or otherwise, pass upon the constitutional questions, would it not be consistent with the opinion for the Court of Appeals to dismiss the appeal on the remand—not on the grounds on which it was reversed—but on grounds that under the Constitution it had no jurisdiction of the subject matter of the litigation? Or is the Court of Appeals to guess among the possibilities: (a) that in the press of the Court's immensely heavy work-

load, the question was simply overlooked, (b) that it was considered to have been raised prematurely, since there was as yet no judgment against (and hence, no punishment of) respondent, or (c) that the motion was tacitly overruled, because (as seems to be implied by Mr. Justice Fortas' question at the argument, "We have decided such cases, haven't we?") the constitutional question is either too absurd or too difficult to discuss?

Common justice as well as common courtesy, we submit, requires that respondent's day in Court result in a decision of this question, honestly raised and directly presented by the record before the Court.

This Court has exercised jurisdiction, inadvertently, we feel, in the face of an as yet undisposed-of challenge thereof on multiple constitutional grounds.

A rehearing should be ordered so that the constitutional claims of respondent may be considered and determined.

Respectfully submitted,

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
Attorney for Respondent.

LON HOCKER, a member of the bar of the Supreme Court, hereby certifies that the foregoing Motion for Rehearing was prepared by him and is presented in good faith for the reasons stated therein and not for delay.

.....
March 20, 1968.



SUPREME COURT OF THE UNITED STATES

No. 43.—OCTOBER TERM, 1967.

Lester J. Albrecht, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
v.		
The Herald Company, etc.		

[March 4, 1968.]

MR. JUSTICE WHITE delivered the opinion of the Court.

A jury returned a verdict for respondent in petitioner's suit for treble damages for violation of § 1 of the Sherman Act.¹ Judgment was entered on the verdict and the Court of Appeals for the Eighth Circuit affirmed. 367 F. 2d 517 (1966). The question is whether the denial of petitioner's motion for judgment notwithstanding the verdict was correctly affirmed by the Court of Appeals. Because this case presents important issues under the antitrust laws, we granted certiorari. 386 U. S. 941 (1967).

We take the facts from those stated by the Court of Appeals. Respondent publishes the *Globe-Democrat*, a morning newspaper distributed in the St. Louis metropolitan area by independent carriers who buy papers at wholesale and sell them at retail. There are 172 home delivery routes. Respondent advertises a suggested retail price in its newspapers. Carriers have exclusive territories which are subject to termination if prices exceed the suggested maximum. Petitioner, who had Route 99, adhered to the advertised price for some time but in

¹Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, in part provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal"

1961 raised the price to customers.² After more than once objecting to this practice, respondent wrote petitioner on May 20, 1964, that because he was overcharging and because respondent had reserved the right to compete should that happen, subscribers on Route 99 were being informed by letter that respondent would itself deliver the paper to those who wanted it at the lower price. In addition to sending these letters to petitioner's customers, respondent hired Milne Circulation Sales, Inc., which solicited readers for newspapers, to engage in telephone and house-to-house solicitation of all residents on Route 99. As a result, about 300 of petitioner's 1,200 customers switched to direct delivery by respondent. Meanwhile, respondent continued to sell papers to petitioner but warned him that should he continue to overcharge, respondent would not have to do business with him. Since respondent did not itself want to engage in home delivery, it advertised a new route of 314 customers as available without cost. Another carrier, George Kroner, took over the route knowing that respondent would not tolerate overcharging and understanding that he might have to return the route if petitioner discontinued his pricing practice.³ On July 27 respondent told petitioner that it was not interested in being in the carrier business and that petitioner could have his customers back as long as he charged the suggested price. Petitioner brought this lawsuit on August 12. In response, petitioner's appointment as a carrier was terminated and petitioner was given 60 days to arrange the sale of his route to a satisfactory replacement. Petitioner sold his route for \$12,000, \$1,000 more

² The record indicates that petitioner raised his price by 10 cents a month.

³ The record shows that at about this time petitioner lowered his price to respondent's advertised price. Although petitioner notified all his customers of this change, respondent apparently remained unaware of it.

than he had paid for it but less than he could have gotten had he been able to turn over 1,200 customers instead of 900.⁴

Petitioner's complaint charged a combination or conspiracy in restraint of trade under § 1 of the Sherman Act.⁵ At the close of the evidence the complaint was amended to charge only a combination between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner." The case went to the jury on this theory, the jury found for respondent, and judgment in its favor was entered on the verdict. The court denied petitioner's motion for judgment notwithstanding the verdict, which asserted that under *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960), and like cases, the undisputed facts showed as a matter of law a combination to fix resale prices of newspapers which was *per se* illegal under the Sherman Act. The Court of Appeals affirmed. In its view "the undisputed evidence fails to show a Sherman Act violation," because respondent's conduct was wholly unilateral and there was no restraint of trade. The previous decisions of this Court were deemed inapposite to a situation in which a seller establishes maximum prices to be charged by a retailer enjoying an exclusive territory and in which the seller, who would be entitled to refuse to deal, simply engages in competition with the offending retailer. We disagree with the Court of Appeals and reverse its judgment.

On the undisputed facts recited by the Court of Appeals respondent's conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act. That section covers combinations in addition to contracts and

⁴ Kroner testified at trial that he sold the customers he had within Route 99 to petitioner's vendee for \$3,600.

⁵ Petitioner also charged respondent with tortious interference with business relations under state law, but this count was dismissed before trial.

conspiracies, express or implied. The Court made this quite clear in *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960), where it held that an illegal combination to fix prices results if a seller suggests resale prices and secures compliance by means in addition to "the mere announcement of his policy and the simple refusal to deal" *Id.*, at 44. Parke Davis had specified resale prices for both wholesalers and retailers and had required wholesalers to refuse to deal with non-complying retailers. It was found to have created a combination "with the retailers and the wholesalers to maintain retail prices" *Id.*, at 45. The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers.

If a combination arose when Parke Davis threatened its wholesalers with termination unless they put pressure on their retail customers, then there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail prices. When respondent learned that petitioner was overcharging, it hired Milne to solicit customers away from petitioner in order to get petitioner to reduce his price. It was through the efforts of Milne, as well as because of respondent's letter to petitioner's customers, that about 300 customers were obtained for Kroner. Milne's purpose was undoubtedly to earn its fee, but it was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to advertised prices, and he knew that he might have to return the customers if petitioner ultimately complied with respondent's demands. He undertook to

deliver papers at the suggested price and materially aided in the accomplishment of respondent's plan. Given the uncontradicted facts recited by the Court of Appeals, there was a combination within the meaning of § 1 between respondent, Milne, and Kroner, and the Court of Appeals erred in holding to the contrary.⁶

The Court of Appeals also held there was no restraint of trade, despite the long-accepted rule in § 1 cases that resale price fixing is a *per se* violation of the law whether done by agreement or combination.⁷ *United States v.*

⁶ Petitioner's original complaint broadly asserted an illegal combination under § 1 of the Sherman Act. Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. See *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 372 (1967). These additional claims, however, appear to have been abandoned by petitioner when he amended his complaint in the trial court.

Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention. See *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F. 2d 196 (C. A. 9th Cir. 1963); *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (D. C. E. D. Pa. 1964), *aff'd per curiam*, 344 F. 2d 775 (C. A. 3d Cir. 1965).

⁷ Our Brother HARLAN seems to state that suppliers have no interest in programs of minimum resale price maintenance, and hence that such programs are "essentially" horizontal agreements between dealers even when they appear to be imposed unilaterally and individually by a supplier on each of his dealers. Although the empirical basis for determining whether or not manufacturers benefit from minimum resale price programs appears to be inconclusive, it seems beyond dispute that a substantial number of manufacturers formulate and enforce complicated plans to maintain resale

Trenton Potteries Co., 273 U. S. 392 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

In *Kiefer-Stewart*, *supra*, liquor distributors combined to set maximum resale prices. The Court of Appeals held the combination legal under the Sherman Act because in its view setting maximum prices "... constituted no restraint on trade and no interference with plain-

prices because they deem them advantageous. See E. Gréther, *Price Control Under Fair Trade Legislation*, c. X (1939); Federal Trade Commission, *Report on Resale Price Maintenance* 5-11, 59 (1945); Select Committee on Small Business, *Fair Trade: The Problem and the Issues*, H. R. Rep. No. 1292, 82d Cong., 2d Sess. (1952); Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. Chi. L. Rev. 825, 832-843 (1955); Corey, *Fair Trade Pricing: A Reappraisal*, 30 Harv. Bus. Rev. 47 (1952); Fulda, *Resale Price Maintenance*, 21 U. Chi. L. Rev. 175, 184-186 (1954). As a theoretical matter, it is not difficult to conceive of situations in which manufacturers would rightly regard minimum resale price maintenance to be in their interest. Maintaining minimum resale prices would benefit manufacturers when the total demand for their product would not be increased as much by the lower prices brought about by dealer competition as by some other nonprice, demand-creating activity. In particular, when total consumer demand (at least within that price range marked at the bottom by the minimum cost of manufacture and distribution and at the top by the highest price at which a price-maintenance scheme can operate effectively) is affected less by price than by the number of retail outlets for the product, the availability of dealer services, or the impact of advertising and promotion, it will be in the interest of manufacturers to squelch price competition through a scheme of resale price maintenance in order to concentrate on nonprice competition. Finally, if the retail price of each of a group of competing products is stabilized through manufacturer-imposed price maintenance schemes, the danger to all the manufacturers of severe interbrand price competition is apt to be alleviated.

tiff's right to engage in all the competition it desired." 182 F. 2d 228, 235 (C. A. 7th Cir. 1950). This Court rejected that view and reversed the Court of Appeals, holding that agreements to fix maximum prices "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U. S. 211, 213.

We think *Kiefer-Stewart* was correctly decided and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as

^a Our Brother HARLAN appears to read *Kiefer-Stewart* as prohibiting only combinations of suppliers to squeeze retailers from the top. Under this view, scarcely derivable from the opinion in that case, signed contracts between a single supplier and his many dealers to fix maximum resale prices would not violate the Sherman Act. With all deference, we reject this view, which seems to stem from the notion that there can be no agreement violative of § 1 unless that agreement accrues to the benefit of both parties, as determined in accordance with some *a priori* economic model. Cf. Comment, The Per Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect, 19 U. Chi. L. Rev. 837 (1952).

the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.⁹ It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain specified prices for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

We also reject the suggestion of the Court of Appeals that *Kiefer-Stewart* is inapposite and that maximum price fixing is permissible in this case. The Court of Appeals reasoned that since respondent granted exclusive territories, a price ceiling was necessary to protect the public from price gouging by dealers who had monopoly power in their own territories. But neither the existence of exclusive territories nor the economic power they might place in the hands of the dealers was at issue before the jury. Likewise, the evidence taken was not directed to the question of whether exclusive territories had been granted or imposed as the result of an illegal combination in violation of the antitrust laws. Certainly on the record before us the Court of Appeals was not entitled to assume, as its reasoning necessarily did, that the exclusive rights granted by respondent were valid under § 1 of the Sherman Act, either alone or in conjunction with a price-fixing scheme. See *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 373, 379 (1967). The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If, as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only

⁹ In *Kiefer-Stewart* after the manufacturer established the maximum price at which its product could be sold, it fair-traded the product so as to fix that price as the legally permissible minimum. 182 F. 2d, at 230-231.

by otherwise illegal price fixing itself injurious to the public, the entire scheme must fall under § 1 of the Sherman Act.

In sum, the evidence cited by the Court of Appeals makes it clear that a combination in restraint of trade existed. Accordingly, it was error to affirm the judgment of the District Court which denied petitioner's motion for judgment notwithstanding the verdict. The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 43.—OCTOBER TERM, 1967.

Lester J. Albrecht, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Eight Circuit.
v.		
The Herald Company, etc.		

[March 4, 1968.]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is a word I would add. This is a "rule of reason" case stemming from *Standard Oil Co. v. United States*, 221 U. S. 1, 62. Whether an exclusive territorial franchise in a vertical arrangement is *per se* unreasonable under the antitrust laws is a much mooted question. A fixing of prices for resale is conspicuously unreasonable, because of the great leverage that price has over the market. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. The Court quite properly refuses to say whether in the newspaper distribution business an exclusive territorial franchise is illegal.

The traditional distributing agency is the neighborhood newspaper boy. Whether he would have the time, acumen, experience, or financial resources to wage competitive warfare without the protection of a territorial franchise is at least doubtful. Here, however, we have a distribution system which has the characteristics of a large retail enterprise. Petitioner's business requires practically full time. He purchased his route for \$11,000, receiving a list of subscribers, a used truck, and a newspaper tying machine. At the time his dispute with respondent arose, there were 1,200 subscribers on the route, and that route covered "the whole northeast section" of a "big city." Deliveries had to be made by

motor vehicle and although they were usually completed by 6 o'clock in the morning, the rest of the workday was spent in billing, receiving phone calls, arranging for new service, or in placing "stop" or "start" orders on existing service. Petitioner at times hired a staff to tie and to wrap newspapers.

Under our decisions* the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue; and that was not done here.

The case is therefore close to *White Motor Co. v. United States*, 372 U. S. 253, where before ruling on the legality of a territorial restriction in a vertical arrangement, we remanded for findings on "the actual impact of these arrangements on competition." *Id.*, 263.

*"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and or predict consequences." *Chicago Board of Trade v. United States*, 246 U. S. 231, 238. Cf. *United States v. Parke, Davis & Co.*, 362 U. S. 29 (economics of the drug distribution business); *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (economics of the bicycle business). In the latter case we noted that the evidence of record "elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices." 388 U. S., at 367.

SUPREME COURT OF THE UNITED STATES

No. 43.—OCTOBER TERM, 1967.

Lester J. Albrecht, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
v.		
The Herald Company, etc.		

[March 4, 1968.]

MR. JUSTICE HARLAN, dissenting.

While I entirely agree with the views expressed by my Brother STEWART and have joined his dissenting opinion, the Court's disregard of certain economic considerations underlying the Sherman Act warrants additional comment.

I.

The practice of setting genuine price "ceilings," that is maximum prices, differs from the practice of fixing minimum prices, and no accumulation of pronouncements from the opinions of this Court can render the two economically equivalent.

The allegation of a combination of persons to fix maximum prices undoubtedly states a Sherman Act cause of action. In order for a plaintiff to win such a § 1 case, however, he must be able to prove the existence of the alleged combination, and the defendant must be unable, either by virtue of a *per se* rule or by failure of proof at trial, to show an adequate justification. It is on these two points that price ceilings differ from price floors: to hold that a combination may be inferred from the vertical dictation of a maximum price simply because it may be permissible to infer a combination from the vertical dictation of a minimum price ignores economic reality; to conclude that no acceptable justification for

fixing maximum prices can be found simply because there is no acceptable justification for fixing minimum prices is to substitute blindness for analysis.

Resale price maintenance, a practice not involved here, lessens horizontal intrabrand competition. The effects, higher prices, less efficient use of resources, and an easier life for the resellers, are the same whether the price maintenance policy takes the form of a horizontal conspiracy among resellers or of vertical dictation by a manufacturer plus reseller acquiescence. This means two things. First, it is frequently possible to infer a combination of resellers behind what is presented to the world as a vertical and unilateral price policy, because it is the resellers and not the manufacturer who reap the direct benefits of the policy. Second, price floors are properly considered *per se* restraints, in the sense that once a combination to create them has been demonstrated, no proffered justification is an acceptable defense. Following the rule of reason, combinations to fix price floors are invariably unreasonable: to the extent that they achieve their objective, they act to the direct detriment of the public interest as viewed in the Sherman Act. In the absence of countervailing fair trade laws, all asserted justifications are, upon examination, found wanting, either because they are too trivial or elusive to warrant the expense of a trial (as is the case, for example, with a defense that price floors maintain the prestige of a product) or because they run counter to Sherman Act premises (as is the case with the defense that price maintenance enables inefficient sellers to stay in business).

Vertically imposed price ceilings are, as a matter of economic fact that this Court's words cannot change, an altogether different matter. Other things being equal, a manufacturer would like to restrict those distributing his product to the lowest feasible profit margin, for in this way he achieves the lowest overall price to the

public and the largest volume. When a manufacturer dictates a minimum resale price he is responding to the interest of his customers, who may treat his product better if they have a secure high margin of profits. When the same manufacturer dictates a price ceiling, however, he is acting directly in his own interest, and there is no room for the inference that he is merely a mechanism for accomplishing anticompetitive purposes of his customers.¹

Furthermore, the restraint imposed by price ceilings is of a different order from that imposed by price floors. In the present case the Court uses again the fallacious argument that price ceilings and price floors must be equally unreasonable because both "cripple the freedom of traders and thereby restrain their liberty to sell in accordance with their own judgment."² The fact of the matter is that this statement does not in itself justify a *per se* rule in either the maximum or minimum price case, and that the real justification for a *per se* rule in the case of minimums has not been shown to exist in the case of maximums.

It has long been recognized that one of the objectives of the Sherman Act was to preserve, for social rather than economic reasons, a high degree of independence, multiplicity, and variety in the economic system. Recognition of this objective does not, however, require this Court to hold that every commercial act that fetters the freedom of some trader is a proper subject for a *per se* rule in the sense that it has no adequate proveable justification. See, e. g., *White Motor Co. v. United States*, 372 U. S. 253. The *per se* treatment of price maintenance is justified because analysis alone, without the burden of a trial in each individual case, demonstrates that price

¹ See the opinion of Judge Coffin in *Quinn v. Mobil Oil Co.*, 375 F. 2d 273, 276.

² *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211, 213, quoted, *ante*, p. 6.

floors are invariably harmful on balance.³ Price ceilings are a different matter: they do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the manufacturer who dictates them and the customer who accepts them have both miscalculated. Since price ceilings reflect the manufacturer's view that there is insufficient competition to drive prices down to a competitive level, they have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits.

When price floors and price ceilings are placed side by side, then, and the question is asked of each "does analysis justify a no-trial rule," the answers must be quite different. Both practices share the negative attribute that they restrict individual discretion in the pricing area, but only the former imposes upon the public the much more significant evil of lessened competition, and, as just seen, the latter has an important arguable justification that the former does not possess. As the Court's opinion partially but inexplicitly recognizes, in a maximum price case the asserted justification must be met on its merits, and not by incantation of a *per se* rule developed for an altogether different situation.⁴

³ See the analysis in the leading case, *United States v. Trenton Potteries Co.*, 273 U. S. 392, at 395-402. Price floors, or other agreements to prevent price cutting, are there held to be *per se* unreasonable because they inevitably lessen competition. There is no reference to the purely collateral effect of limiting individual trader discretion, still less to a program such as the one involved in this case that does not inhibit competitive price cutting.

⁴ The same points may be made from the perspective of the retailers or wholesalers subject to the price dictation. When the issue is minimum resale prices, those sellers who are more efficient and ambitious are likely to object to price restrictions, while the lazier and less efficient sellers will welcome their protection. When the issue is price ceilings, the matter is different. Assuming the

II.

The Court's discovery in this case of (a) a combination and (b) a restraint that is *per se* unreasonable is beset with pitfalls. The Court relies directly on combinations with Milne and Kroner, two third parties who were simply hired and paid to do telephoning and distributing jobs that respondent could as effectively have done itself. Neither had any interest of his own in respondent's objective of setting a price ceiling. If the critical question is whether a company pays one of its own employees to perform a routine task, or hires an outsider to do the same thing, the requirement of a "combination" in restraint of trade has lost all significant meaning. The point is more than that the words in a statute ought to be taken to mean something of substance. The premise of § 1 adjudication has always been that it is quite proper for a firm to set its own prices and determine its own territories, but that it may not do so in conjunction with another firm with which, in combination, it can generate market power that neither would otherwise have. A firm is not "combining" to fix its own prices or territory simply because it hires outside accountants, market analysts, advertisers by telephone

ceilings are high enough to permit a return that will enable the seller to stay in business, a seller will object to price ceilings only because they deny him the supercompetitive return that the imperfections of competition would otherwise permit. At the same time, in stark contrast to the situation involved in resale price maintenance, no seller has any interest in insisting that price ceilings be imposed on his competitors; he is not worried that they may sell at a higher price than his own. Thus while resale price maintenance establishes what is the equivalent of a single horizontal restraint on otherwise competitive sellers, price ceilings establish merely a series of distinct vertical relationships between manufacturer and seller, with no one seller economically interested in the maintenance of the vertical relationship with any other seller.

or otherwise, or delivery boys. Once it is recognized that Kroner had no interest whatever in forcing his competitor to lower his price, and was merely being paid to perform a delivery job that respondent could have done itself, it is clear respondent's activity was in its essence unilateral.

The Court, quite evidently dissatisfied with the Milne and Kroner theories of combination, goes on to suggest two others not claimed. First, it is said, petitioner might have alleged a combination with other carriers who accepted respondent's maximum price. The difficulty with this thesis is that such a "combination" would have been wholly irrelevant to what was done to petitioner. In a price maintenance situation, each distributor does have an interest in preventing others from breaking the price line and driving everyone's prices down, and there is thus a real symphony of interests behind the pressure exerted on any individual retailer. However, in contrast, the effectiveness of a price ceiling imposed on one distributor does not depend upon the imposition of ceilings on other distributors, be they competitive or not. Each distributor's maximum price agreement is, for reasons already discussed, a vertical matter only, independent of agreements by other dealers. Hence the result of the Court's theory here would be to make what was done to this petitioner illegal because of the coincidental existence of unrelated similar agreements, and to base petitioner's right to recover upon activities that are altogether irrelevant to whatever harm he has suffered.

The Court also suggests that, under *Parke, Davis*, "petitioner could have claimed a 'combination' between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price." This theory is intriguing, because although it is unsound on its face, it has within it the ring of something familiar. Obviously it makes no sense to deny recovery to a pres-

sured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages. It is not the momentary acquiescence but the punishment for refusing to acquiesce that does the damage on which recovery is based.

The Court's difficulties on all of its theories stem from its unwillingness to face the ultimate conclusion at which it has actually arrived: it is unlawful for one person to dictate price floors or price ceilings to another; any pressure brought to bear in support of such dictation renders the dictator liable to any dictatee who is damaged. The reason for the Court's reluctance to state this conclusion bluntly is transparent: this statement of the matter takes no account of the absence of a combination or conspiracy.

This does not mean, however, that no combination or conspiracy could ever be inferred in such an ostensibly unilateral situation. It would often be proper to infer, in situations in which a manufacturer dictates a minimum price to a retailer, that the manufacturer is the mechanism for enforcing a very real combinatorial restraint among retailers who should be competing horizontally.⁵ Instead of undertaking to analyze when this inference would be proper, the Court has in the past

⁵ See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655. Professor Turner (as he then was) suggested the overruling of *United States v. Colgate & Co.*, 250 U. S. 300, arguing, *inter alia*, that *Colgate* behavior by a manufacturer tends to produce tacit or implied minimum price agreements among otherwise competitive retailers. He suggests that "it should be perfectly clear to any manufacturer that a policy of refusing to deal with *price cutters* is no more nor less than an invitation [to retailers] to agree [with each other as well as with the manufacturer] on . . . a *minimum price* . . ." *Id.*, at 689. (Emphasis added.)

followed the rough approximation adopted in *Parke, Davis*:⁶ there is no "combination" when a manufacturer simply states a resale price and announces that he will not deal with those who depart from it; there is a combination when the manufacturer goes one inch further. The magical quality in this transformation is more apparent than real, for the underlying horizontal combination may frequently be there and the Court has simply failed to state what it is.⁷

When a manufacturer dictates a maximum price, however, the *Parke, Davis* approach does not yield even a satisfactory rough answer to the question "is there a combination"? For the manufacturer who purports to act unilaterally in dictating a maximum price really is acting unilaterally. No one is economically interested in the price squeeze but himself. Had the Court been in the habit of analyzing the economics on which the inference of a combination may be based, it would have seen that even if combinations to fix maximum prices are as illegal as combinations to fix minimum prices the circumstances under which a combination to fix maximum prices may be inferred are different from those which imply a combination to keep prices up.

It was for this reason that in *Kiefer-Stewart v. Seagram & Sons*, 340 U. S. 211, the only case in this Court in which maximum resale prices have actually been held

⁶ *United States v. Parke, Davis & Co.*, 362 U. S. 29.

⁷ I thought at the time *Parke, Davis* was decided, see my dissenting opinion in that case, 362 U. S., at 49, and continue to believe, that the result reached could not be supported on the majority's reasoning. I am frank to say, however, that I now consider that the *Parke, Davis* result can be supported on Professor Turner's rationale. See Turner, *supra*, n. 5, at 684-691. Further reflection on the matter also leads me to say that my statement in dissent to the effect that *Parke, Davis* had overruled the *Colgate* case was overdrawn, and further that I am not yet prepared to say that Professor Turner's rationale necessarily carries the total discard of *Colgate*.

unlawful, the key question was whether there was an actual horizontal combination of manufacturers to impose on retailers a maximum resale price. The Court refused to hold that dictation of price ceilings to a single retailer by a single manufacturer was unlawful, but instead insisted upon, and found, a situation in which two manufacturers, in their common interest, combined to impose upon retailers a condition of doing business which they might not have been able to demand individually.

Kiefer-Stewart's treatment of the combination requirement is instructive. Any manufacturer is at perfect liberty to set the prices at which he will sell to retailers, and in that way maximize his profits while lessening theirs. Competition, that is the threat that the purchasing seller will simply turn to another manufacturer, prevents the manufacturer from raising his prices beyond a certain point. It is *per se* unlawful, however, for two manufacturers to combine to raise their prices together, rendering each of them secure because the retailer or wholesaler has nowhere else to turn. From the manufacturer's viewpoint, putting a ceiling on the resale price may be simply an alternative means to the end of maximizing his own profits by lessening distribution costs: instead of squeezing the reseller from the bottom he squeezes from the top. The holding of *Kiefer-Stewart* was that the squeeze from the top, like the squeeze from the bottom, was lawful unless by a combination of persons between whom competition would otherwise have limited the power to squeeze from either direction. No combination of the kind required in *Kiefer-Stewart* exists here, and the Court has found no sensible substitute theory of combination.

The Court's second difficulty in this case is to state why imposition of price ceilings is a *per se* unlawful restraint. The respondent offered as a defense the con-

tention that since there was no competition between distributors to keep resale prices down, a fixed maximum price was in the interest of both the respondent itself and the public. The Court, recognizing that despite scattered dicta about maximum and minimum prices both being *per se* illegal there was here an alleged justification that would have to be faced on its merits, attempts to show that the defense may be disposed of without hearing evidence on it.

The Court has not been persuasive. The question in this case is not whether dictation of maximum prices is *ever* illegal, but whether it is *always* illegal. Petitioner is seeking, and now receives, a judgment notwithstanding the verdict of a jury that he had failed to show that the practice was unreasonable in this case. The best the Court can do is to list certain unfortunate consequences that maximum price dictation might have in other cases but was not shown to have here. Then, in rejecting the significant affirmative justification offered for defendant's practice, the Court merely says, "The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive." *Ante*, p. 8. I shall ignore the insertion of the word "illegal," which merely assumes the conclusion. I cannot understand why, in deciding whether a practice is an unreasonable restraint of trade, the Court finds it "unpersuasive" that the practice blunts pernicious attributes of an existing distribution system.

The Court's only answer is that the courts below did not consider whether the existing distribution system might itself be illegal. But even assuming that respondent can conceivably be penalized for failure to raise the question whether the distribution system, unchallenged by petitioner, was lawful, the Court's argument falls short. The Court has decided that exclusive territories and consequent market power can never be a justification

for dictation of maximum prices because exclusive territories are sometimes unlawful. But they are neither always unlawful nor have they been demonstrated to be unlawful in this case.

It may well be that the mechanics of newspaper distribution are such that a city quite naturally divides itself into one or more relatively exclusive territories (sometimes called "paper routes"), giving each distributor a large degree of monopoly power. It is hardly far-fetched to assume that a newspaper might be able to prove (if given the opportunity it is today denied) that rough territorial exclusivity is simply a fact of economic life in the newspaper distributing business, both because the nature of the enterprise dictates compactness of routes and because the number of distributors that a particular area can sustain is necessarily so small that they naturally fall into oligopolistic respect for each other's territories, and into a pattern of price leadership.

There is no question that the ideal situation, from the point of view both of the publisher and the public, is to have a very large number of distributors intensely vying with each other in both price and service. This situation, however, may be one that it is impossible to achieve in some, perhaps in all cities. It seems quite possible that a publisher who does not want to do his own distributing must live with the fact that there will always be a relatively small number of competing distributors, who consequently will be likely to fall into lawful but undesirable oligopolistic behavior—price leadership and territorial exclusivity.

Confronted by this situation, the publisher, who is competing with other publishers in, among other things, price and service to the public, will seek to provide efficient distribution service at the lowest possible price. These objectives would be realized by intense competition without the publisher's interference, but in the

absence of such competition the publisher must take steps of his own.

The present respondent took two steps. First, he insisted on the right to approve each distributor. Naturally, since newspapermen are notoriously realistic, he referred to the acquisition of a distributorship as the purchase of a "route." Second, he set a maximum home delivery price and enforced it; the price could not be below the level that perfect competition would dictate without driving the distributors out of business and defeating the publisher's whole objective. Hence the price set cannot be supposed to have been unreasonable.⁸ Respondent had no need to go to the extreme of cutting off distributors preferring to do a high-profit, low-volume business, and did not do so. It simply advertised the maximum home delivery price and created competition with any distributor not observing it. Today's decision leaves respondent with no alternative but to use its own trucks.

For the reasons stated in my Brother STEWART's opinion and those stated here, I would affirm the judgment below.

⁸ Reasonableness is also evidenced by the abundance of persons willing to distribute newspapers at or below the fixed ceilings. The point is not affected by the fact that the distributors willing to accept respondent's conditions were buying monopolies. The principal virtue of a monopoly is the power of the monopolist to charge supercompetitive prices. Hence it cannot be argued that the ceilings might have proved too low to attract buyers but for the fact that they were accompanied by monopoly power.

SUPREME COURT OF THE UNITED STATES

No. 43.—OCTOBER TERM, 1967.

Lester J. Albrecht, Petitioner,	} On Writ of Certiorari to	
v.		the United States Court
The Herald Company, etc.		of Appeals for the Eighth Circuit.

[March 4, 1968.]

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

The respondent is the publisher of the only morning newspaper in St. Louis. The petitioner was one of some 170 independent distributors who bought copies of the paper from the respondent and sold them to householders. Each distributor had an exclusive territory subject only to the condition that his resale price not exceed a stated maximum. When the petitioner's price did exceed that maximum, the respondent allowed and indeed actively assisted another distributor to enter the petitioner's territory and compete with him. The Court today holds that this latter practice by the respondent subjected it to antitrust liability to the petitioner. I cannot understand why.

The case was litigated throughout by both parties upon the premise that the respondent's granting of an exclusive territory to each distributor was a perfectly permissible practice. Upon that premise the judgment of the Court of Appeals was obviously correct. For the respondent's conduct here was in furtherance of, not contrary to, the purposes of the antitrust laws. The petitioner was a monopolist within his own territory; he was the only person who could sell for home delivery the city's only morning newspaper. But for the fact that respondent provided competition above a certain

price level, the householders would have been totally without protection from the petitioner's monopoly position. The cases cited by the petitioner, such as *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211, and *United States v. Parke, Davis & Co.*, 362 U. S. 29, did not involve monopoly products distributed through exclusive territories and are thus totally inapplicable here. The thrust of those decisions is that the reseller should be free to make his own independent pricing determination. But that cannot be a proper objective where the reseller is a monopolist.¹ To the extent that the respondent prevented the petitioner from raising his price above that which would have prevailed in a competitive market, the respondent's actions were fully compatible with the antitrust laws.²

But, says the Court, the original grant of an exclusive territory to the petitioner may have itself violated the antitrust laws. Putting aside the fact that this question was not briefed or argued either here or in the court below, I fail to understand how the illegality of the petitioner's exclusive territory could conceivably help his case. The petitioner enjoyed the benefits of his exclusive territory subject to the condition that he keep his price below a stated maximum. When he did charge more, the respondent took steps to force the petitioner's price down by introducing competition into his territory. If it was illegal in the first place for the petitioner to enjoy

¹ See Elman, "Petrified Opinions" and Competitive Realities, 66 Col. L. Rev. 625, 633 (1966).

² Because the major portion of the respondent's income derives from advertising rather than from sales to distributors, the respondent's self-interest is in keeping the retail price of the paper low in order to increase circulation and thereby increase advertising revenues. However, neither the petitioner nor the Court suggests that the maximum set by the respondent was less than the price that would have prevailed if there had been competition among the distributors.

a *conditional* monopoly, I am at a loss to understand how the respondent can be liable to the petitioner for not permitting him a *complete* monopoly.

The Court in this case does more, I think, than simply depart from the rule of reason.³ *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1. The Court today stands the Sherman Act on its head.⁴

³ See generally Elman, "Petrified Opinions" and Competitive Realities, 66 Col. L. Rev. 625 (1966). "It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden." 66 Col. L. Rev., at 627.

⁴ "The Supreme Court shows a growing determination in its anti-trust decisions to convert laws designed to promote competition into laws which regulate or hamper the competitive process." Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale L. J. 70 (1967).